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# U. S. Supreme Court.

OCTOBER TERM, 1884.

**No. 1149.**

JOSEPH W. DYER and others,

*Appellants,*

against

THE NATIONAL STEAM NAVIGATION COMPANY,

*Respondent.*

# RESPONDENT'S BRIEF.

JOHN CHETWOOD,

*Respondent's* PROCTOR

New York:
CHARLES H. JONES & CO., STEAM PRINTERS, 114 FULTON STREET.
1885.

# Supreme Court of U. S.

OCTOBER TERM, 1884.—No. 1149.

JOSEPH W. DYER, *et al.*,
Appellants,
*vs.*
THE NATIONAL STEAM NAVIGATION COMPANY.

## Statement of the Case.

The original libel in this cause was filed in the District Court for the Eastern District of New York, December 6, 1866, by Joseph W. Dyer and others, owners of the American Ship *Kate Dyer*, (the Republic of Peru, shipper of cargo therein, and Henry H. Rollins, a passenger, intervenors), against the National Steam Navigation Company, a British corporation, owner of the Steamship Scotland, to recover damages for the value of the *Kate Dyer*, her freight, cargo and some personal effects—which ship had then recently sunk in a collision with the *Scotland*, on the high seas, off Fire Island, the *Scotland* herself having, from the effects of the collision, also sunk off Sandy Hook, while trying to make the Harbor of New York.

Interlocutory Decree was entered in the District Court, March 17, 1869; final decree in favor of libellants for the entire value of the vessel, freight, cargo, and effects, July 17th, 1874. Decree in the Circuit Court was entered August 1, 1878, affirming the same, and refusing to limit the liability of the owners of the *Scotland*.

The decree in this Court reversing that part of decree of the Circuit Court which condemned the *Scotland's* owners to pay the "whole amount of damages," and affirming the remainder of the same, was entered March 20, 1882. (Rec'd, p. 6.)

After the decision of this Honorable Court and the reading of its opinion in March, 1882, (the National Steam Navigation Company being then appellant, and Joseph W. Dyer & al., respondents; there was also a cross appeal, wherein Joseph W. Dyer & al. were appellants, and the National Steam Navigation Company was respondents), the said Dyer & al., respondents, moved this Court to withhold its Mandate and for a re-argument. This motion was denied, and the Mandate (Rec. p. 3) issued in the usual form to the United States Circuit Court for the Eastern District of New York, commanding proceedings to be had in conformity with the opinion which required a decree to be entered that these respondents should pay into Court the value of the *Scotland's* strippings and remnants, and that if any further inquiries were necessary to be made in order to ascertain the proper amount to be paid by respondents, as depending upon the value of the articles saved, including freight and passage money realized, the said Circuit Court should properly institute the same.

When this Mandate was presented in the Circuit Court that proceedings might be taken and inquiries made in accordance therewith, the present appellants' moved His Honor the Circuit Judge, to order that the same extend to and include the amount of insurance upon the *Scotland* at the time of her loss. His Honor refused to so order, because the Mandate did not so command.

The present appellants then came back to this Honorable Court and made a motion to have the Mandate amended so as to extend to and include insurance in the inquiry to be made by the Circuit Court, and the amount thereof to be ascertained to fix the proper amount to be paid by this respondent; this Honorable Court dismissed such motion.

Subsequently, and on the fifth day of June, 1884, the Mandate was presented in the said Circuit Court for the Eastern District of New York, his Honor the Associate-Justice of this Court then sitting, counsel were heard for the respective parties and a decree (Rec. p. 7) was entered reversing the decree of said Circuit Court as originally rendered condemning the appellant to pay the whole damage sustained by the libellants and intervenors, and in all other respects affirming said decree. A reference was also ordered to one of the Commissioners of that Court to ascertain the proper amount to be paid by these respondents as depending upon the value of the articles saved from the *Scotland*, including pending freight or passage money.

Upon the making of that decree the appellants moved for leave to file further allegations alleging insurance upon the *Scotland* and her pending freight, and that it be referred to said Commissioner to take testimony as to its amount and terms. This Respondent insisted that it was not included in the Mandate, and that the Court had no power to allow its introduction at that stage of the cause by supplemental allegation, or to allow testimony about it to be taken. The order was nevertheless made as prayed by the appellants and inserted in the decree; but there was inserted therein also a provision that the respondent should not be concluded by the allegations in said petition, or prejudiced in its right to insist that the question of insurance was wholly irrelevant, or that such question had been disposed of by the judgment and Mandate of this Honorable Court, or that no order should be made permitting the filing of supplemental allegations, or taking proofs concerning insurances, or that said Court had no power to allow such supplemental allegations, or to refer the subject of insurance or authorize testimony to be taken thereunder (Rec. p. 8).

Upon the coming in of the Commissioner's report, His Honor found at the Circuit, (Record, p. 15), that the value of the articles saved from the wreck

of the *Scotland* amounted to $4,927.85 realized by her owners on July 27th, 1868. That the freight for the proposed voyage amounted to $13,703.20 only $11.50 of which was paid, and that no part of the cargo was carried to its destination. That the passage money received for the voyage amounted to $1,703.65 which was refunded to the passengers or paid for their board and trans-shipment at the city of New York, except the sum of $911.82 paid for the passage of said passengers to their destination by the steamship *The Queen*, another vessel of these respondents.

That there was a marine insurance against sea risks on the *Scotland* at the time of her loss for £63,500 of which her owner collected £61,647.13.0 within 9 months after the loss.

That the policy of insurance upon the *Scotland* contained the usual collision clause expressed as follows :

"And it is further agreed that, if the ship hereby "insured shall come into collision with any other "ship or vessel, and the insured shall in consequence "thereof become liable to pay, and shall pay, to the "persons interested in such other ship or vessel, or in "the freight thereof, or in the goods or effects on "board thereof, any sum or sums of money not ex- "ceeding the value of the ship hereby assured, calcu- "lated at the rate of eight pounds per ton on her "registered tonnage, we will severally pay the assur- "ed such proportion of three-fourths of the sum so "paid as our respective subscriptions hereto bear to "the value of the ship hereby assured, calculated at "the rate of eight pounds per ton, or if the value "hereby declared amounts to a larger sum, then to "such declared value, and in cases where the liabil- "ity of the ship has been contested with our con- "sent in writing, we will also pay a like proportion "of three-fourth parts of the costs thereby incur- "red, or paid, provided also, that this clause shall "in no case extend to any sum which the insured "may become liable to pay or shall pay in respect

" of loss of life or personal injury to individuals " for any cause whatsoever."

That immediately before the collision the value of the *Scotland* was £100,000.

That there was marine insurance against sea perils upon the *Kate Dyer* at the time of her loss and upon her freight amounting in all to $96,500 which was collected by her owners within 9 months of her loss.

The Court found as matter of law that the proper amount to be paid by this respondent, as depending upon the value of the articles saved from the wreck of the *Scotland*, was $4,927.85. That no freight or passage money was realized.

That the insurances effected respectively on the *Scotland* and *Kate Dyer* at the time of the collision were immaterial and irrelevant to the issue in this cause.

That the amount of insurance effected, existing and collected on the *Scotland* formed no part of the interest of this respondent in said steamship or her value to be surrendered in limitation of the liability fixed by the original decree in the Circuit Court in this suit.

Requests for different findings of law were made by the appellants (Rec. p. 14) and refused.

The appellants filed exceptions to such refusal and also to the conclusions of law on the 21st day of July, 1884 (Record p. 17).

Thereupon, on the 22d day of September, 1884, there was entered a final decree of the said Circuit Court (Record p. 19) whereby it was adjudged that the respondent pay into the registry of the Court $4,927.85, the value of the strippings and remnants of the *Scotland*, $2,173.10 costs of the District Court and $99.86 costs in the Circuit, amounting in all to $7,200.75.

The appellants then took the present appeal from so much of said decree as failed to allow interest on $4,927.85, the value of the strippings, &c., of the *Scot*

*land* from Dec. 1, 1866; from so much of said decree as failed to allow interest on the costs of the District Court from July 17, 1874; from so much of said decree as failed to direct that this respondent pay into the registry of the Court the sum of $290,867.46, the amount of insurance collected by the respondent on steamship *Scotland*, together with interest from September 1, 1867 (Record, p. 20).

## First Point.

The decree of this Honorable Court was final as to all matters at issue in the cause. The questions passed upon were whether these respondents were liable for the entire amount of damage sustained by the libellants, or whether the liability was limited, and if limited, the extent of the liability so limited. Libellants in the Circuit had not been satisfied to rest upon the broad ground that there was no limit of liability whatever, but had given evidence showing remnants and strippings saved from the *Scotland* (original Record, pp. 170, 171), they made no attempt to prove insurance. They argued the cause exhaustively in this Court without allusion to insurance, and this Court in its opinion, a broad one covering the whole ground of contention between the parties, decided that there was a limitation of these respondents' liability; and as to its measure, that these respondents should pay the value of the ship's strippings and remnants into Court; that if any further inquiry were necessary to be made in order to ascertain the proper amount to be paid by these respondents as depending upon the value of the articles saved including freight or passage-money realized, the court below should institute them in a proper way.

The Mandate required conformity with the opinion; the Circuit Court was instructed to modify its

decree [redacted] to carry out the laid down in the opinion.

How can a new subject be taken up fo[redacted]tion by the Court below? How can the question of insurance be then first obtruded into the cause? What power has the Court below to take a different course from that marked out for it by this Honorable Court?

What does this Court in a similar case say speaking through Chief Justice Marshall? It was a case in which a decree of condemnation of captured goods was reversed in this Court, and in carrying the Mandate into effect the Circuit Court allowed interest on money into which cargo had been converted. "Money, if it be in the hands of an indi-"vidual, may bear interest or not, as the Court may "direct. But it is not to be supposed that party "to whom restitution is awarded receives interest in "such case unless it be decreed by the Court. This "Court did not decree interest, * * * the allow-"ance of interest therefor in the Court below is over-"ruled." Rose *v.* Himely, 5 Cranch, 313.

The same rule was laid down as emphatically and in more detail by this Court in a later case, speaking through Mr. Justice Story, whose language is so singularly apposite here that it is quoted at some length.

"All the claims of Mr. Burke might certainly have "been brought forward and insisted upon in the "original proceedings. * * * * *

"But no such claims were insisted upon in the "written allegations or even *viva voce* at the hearing, "the omission was voluntary, and the decree of res-"titution passed in the most absolute and uncon-"ditional form; the consequences of now admit-"ting them to be brought before this Court by appeal "would be most inconvenient, and mischievous in "practice, it would encourage the grossest *laches* "and delay—the party might lie by through the "whole progress of the original cause until final de-"cree * * * and then start new claims for future

"investigation which would protract the final decis-
"ion to an indefinite period. Such a course would
"have a tendency justly to bring into disrepute the
"administration of justice and inflict upon the inno-
"cent all the evils of expensive litigation.

"We think, therefore, that upon principle, every
"existing claim which the party has omitted to make
"at the hearing upon the merits and before the final
"decree is to be considered as waived by him, and is
"not to be entertained in any future proceedings, and
"when a decree has been made which is in its own
"terms absolute, it is to be carried into effect ac-
"cording to those terms, and excludes all inquiry
"between the litigating parties as to liens or claims
"which might have been attached to it by the Court
"if they had been previously brought to its notice."

The Court then goes on to hold the rule against the libellant, as well, who had also sought damages in the Circuit outside the Mandate of this Court; and although what he asked was considered by this Court as proper to be granted on the merits, it was shut out as inadmissible in that stage of the cause.

**The Santa Maria, 10 Wheat., 431.**

This Court is virtually asked now to review its own decisions. This it has no power to do.

**Ex parte Sibbald *vs.* United States, 12 Pet., 492.**

The Circuit Court could not go beyond the Mandate, it "is bound by the decree as the law of the
"case and must carry it into execution according to
"the Mandate. They cannot vary it or examine it
"for any other purpose than execution; or give any
"other or further relief, * * * or intermeddle
"with it further than to settle so much as has
"been remanded—after a Mandate no rehearing
"will be granted. * * * * * On a subse-
"quent appeal nothing is brought up but the
"proceedings subsequent to the Mandate," (Ib. 493), and this was also held in a case where it was con-

ceded that this Court was without jurisdiction at the time it heard the cause in which it made its decree and issued its Mandate.

Wash. Bridge Co. *vs.* Stewart, 3 How., 424.

## Second Point.

Whether early or late in the cause, the attempt to introduce insurance as a part of the surrender value to entitle the respondent to limitation of its liability is untimely and obtrudes a subject utterly irrelevant.

### I.

THE STATUTE.

What says the statute? "The liability of the owner of any vessel * * * for any loss, damage or injury by collision * * * shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending." (§ 4,283.)

"Whenever * * * the whole value of the vessel and her freight for the voyage is not sufficient to make compensation to each of them," i. e. freighters, owners of property, etc., "they shall receive compensation from the owner of the vessel, in proportion to their respective losses." (§ 4,284.)

"It shall be deemed a sufficient compliance on the part of such owner with the requirements of this title * * * if he shall transfer his interest in such vessel and freight for the benefit of such claimants." (§ 4,285.)

What does interest mean?

"Interest, the most general term that can be employed to denote a property in lands or chattels." (2d Burril's Law Dictionary.)

"Interest, the right of property which a man has in a thing." (1 Bouvier's Law Dictionary.)

"Interest. With regard to the interest or property in goods and chattels, it may be either joint or several, joint if shared with others, as with the part owners of a ship." (Brown's Law Dictionary.)

The contention that the word interest has elasticity enough to stretch over and include insurance is ill founded on the face of this statute. The "whole value of the vessel and freight" is the expression in § 4,284 and assuredly adjoining sections of the same statute on the same subject may be looked to for the explanation of an ambiguity, if one exists.

It is no unfair construction to apply to the words in § 4,283, over which contention has arisen, that "amount" is intended where there are several owners to designate the proportion, one-fifth or whatever it may be that the individual owner holds and "value" its actual worth as a factor in the sum of liability.

Judge Strong holds that this section is intended to express the idea of limiting the liability of each separate owner if there be several, according to the value of his interest or share, leaving the joint owners liable to the extent of the value of their shares, making the words *share and interest* in this case, synonyms. *City of Norwich*, 3 Benedict, 318.

A statute usually expresses what it means. If Congress had meant to include insurance in surrender value it was very easy to say so. It certainly did not say so. The subject of the present statute was not a difficult one to give expression to. There is no patent ambiguity. It is insisted there is in fact no latent ambiguity. It requires imagination stimulated by interest to detect ambiguity at all.

Mr. Justice Blatchford tersely expresses this in Thommessen *v.* Whitwell, 12 Fed. Rep., 891. "I "think it is sufficient to rest the question on the "plain language of the statute. The 'interest' in "the vessel, which is the measure of liability under "§ 4283, and a transfer of which is made under

"§ 4285, operates to discharge the claim for loss or "damage does not extend to what is not an interest "in the vessel. It was easy for the statute to have "provided for liability for and transfer of claims "for insurance. It fails to do so, whether the "Maritime Law did so or not."

In this case the insurance sought to be grasped was Marine Insurance. In the other Circuit Court case (*The City of Norwich*, 17 Blatch, p. 234), where fire insurance was the coveted object, Mr. Justice Strong was equally emphatic. "The subject to be "surrended is the interest of the owners in the vessel "and freight. Not a word is said of transfer of in- "surance.* * * There is nothing in the Act of "Congress to indicate that the transfer of the in- "terests of the owners to a trustee was intended to "have any different effect from that of an ordinary "transfer of personal property which neither in law "or equity carries with it insurance on any collateral "contract. It seeme to me, therefore, that were I "to hold that the owners are responsible, not only "to the extent of the value of the vessel and the "freight, but also for the insurance collected, I "should in effect interpolate in the statute words "which Congress refrained from using and extend "the liability beyond the limit prescribed."

Against all such attempts at interpolation, this Honorable Court has strongly barred the doors in *John Den*, Lessee, &c. *v.* Thomas Reid, Jr., 10 Peters, 528, when it says: "But it is not for the "Court to say, when the language of the statute is "clear, that it shall be so construed as to embrace "cases, because no reason can be assigned why "they were excluded from its provisions."

In the present case even the appellants in candor must concede that there are many assignable reasons for exclusion.

## II.

### Insurance.

What do the text writers say of insurance?

It is a contract of indemnity. A personal contract not an incident to the subject insured. It is an obligation to make good to the party really assured any loss that *he* may sustain from the perils insured against, according to the nature and terms of his insurance, not an obligation to make good every damage that from the same cause the property insured may sustain without regard to its ownership. (2 Duer on Ins., pp. 52, 58.)

Marine insurance is a contract whereby, for a consideration stipulated to be paid by one interested in a ship, freight or cargo subject to marine risks, another undertakes to indemnify him against some or all of these risks during a certain voyage. (1 Phillips, Ins., p. 1.)

It is a mere special agreement with a party to secure himself against apprehended loss on account of his interest in a particular subject matter. The contract of insurance does not run with the subject matter of insurance unless by stipulations wholly foreign to itself, either interpolated in the contract or in addition thereto. Satisfaction is to be made to the person insured for the loss he may have sustained, for it cannot properly be called insuring the thing, since there is no possibility of doing it, and therefore must mean insuring the person from damage. (May on Ins., § 6.)

"Insurance is a contract whereby one party in "consideration of a stipulated sum undertakes to "indemnify the other against certain perils or risks to "which he is exposed or against the happening of "some event." Marshall on Ins. p. 7.

"The contract is personal, and insures not the prop-"erty but the assured against loss by its destruc-

"tion and consequently does not pass as an incident "to the property; therefore, unless assigned with "the consent of the insurer it becomes inoperative "when the interest of the insured in the property "ceases." Wood on Fire Insurance, § 249.

The cases which may be cited indiscriminately and in great numbers are strong, tying down the benefit of insurance to the person with whom and for whom the contract was made.

"One whose interest was not intended to be "insured cannot claim the benefit of an insurance "effected by others, although by the terms of the "policy his interest would seem to be covered." The Pacific Ins. Co. *vs.* Catlett and Keith, 4 Wen., 75.

"The contract with the office strictly taken a "wager, liberally, an indemnity, but in the words, "only a wager, of which third persons shall not "avail themselves." Yates *vs.* White, 4 Bing., N. C., 324.

"These policies are not insurances of the specific "things mentioned to be insured, nor do such in- "surances attach on the realty, or in any manner "go with the same as incident thereto by any con- "veyance or assignment, but are only special agree- "ments with the persons insuring against such loss "or damage as they may sustain. * * * These "policies are not in their nature assignable nor is "their interest ever intended to be transferable "from one to another, without the express consent "of the office." Lynch *vs.* Dalzell, 3 Brown's Par. Cases, 431 (Lord Chan. King).

"The Society are to make satisfaction in case of "any loss by fire. To whom or for what loss are "they to make satisfaction? Why, to the person "insured, and for the loss he may have sustained; "for it cannot properly be called insuring the "thing, for there is no possibility of doing it, and "therefore must mean insuring the person from "damage." Sadlers Company *vs.* Babcock, 2 Atk., 554 (Lord Hardwicke).

The extracts above given are quoted and ap-

proved by this Court in Carpenter *v.* The Providence Washington Ins. Co., 16 Peters, 503, and reference in that opinion made to similar doctrine held by this Court in Columbia Ins. Co. of Alexandria *v.* Lawrence, 10 Pet. 512.

It can hardly be necessary to quote from or even cite further authorities to this elementary principle of insurance law. I may, however, be permitted to quote the tersely expressed first reason of Mr. Justice Strong for holding that the statute was not intended to include something beyond the value of the vessel and freight, such as insurance, "Because a policy of insurance is no interest in the "thing insured." *City of Norwich*, 17 Blatchford, 234.

The contract is to indemnify the person insuring, not somebody else. Not because he retains an interest in the property, but because the property is gone. The claim of appellants is therefore inconsistent with itself. It is based on the continued existence of an interest as owner, the annihilation of which only entitles to payment under the policy. The policy was an insurance of the owners of the *Scotland* against the loss of their vessel. Appellants, without the consent of either contracting party, propose to make it an insurance of the *Kate Dyer*, S OWNERS

## III.

### The Maritime Law.

A strong sense of the difficulty of bringing insurance in as a part of surrender value under the statute has led to the attempt to partly bridge over the gulf by the help of the Maritime Law. Consideration shows that the fair result is a confirmation of the law as literally expressed in the statute.

With the permission of the Court a brief has been filed in this cause on this branch of the subject by the advocates for the appellants in Thommessen *et al.*, *v.* Whitwell *et al.*, now on its way to this Court, on appeal from the Circuit Court for the Eastern District of New York.

The brief is of remarkable research and great literary interest; its aim and object are to show that under the Maritime Law and the law of the continent of Europe, insurance was a necessary part of surrender value.

What is the practical result of the brief when analyzed? In France Valin and [redacted] have contended for insurance as a part of surrender value; to the contrary are Emerigon, "who had great experience as an admiralty lawyer and Judge," (so says this Court in *The North Star*), and Boulay Pati[redacted].

There was no requirement of surrender of insurance in *l'Ordonnance de la Marine* nor in the *Code de la Commerce.* In 1841 the subject was brought forward for legislation; there was elaborate, earnest argument on both sides, and the result was a refusal to introduce into the *Code de la Commerce* a requirement of the surrender of insurance, and so stood the French law, and the law throughout the Continent of Europe, except in Prussia, when Congress passed the Act of 1851. Prussia required surrender of insurance under an old statute.

In 1856, the Germanic Confederation organized a commission to prepare a general Commercial Code for all the States. Prussia took part and tried hard to get a requirement of insurance surrender inserted but failed; the new Code took effect in 1862, and she, herself, of necessity then came under the same state of law on this subject, which had always previously obtained in the other States and in the other Continental countries.

Judge Benedict, with much learning and in much detail, considers the law of continental Europe, and

the general maritime law, as affecting insurance surrender in the *City of Norwich* (8 Benedict, 318), and reaches his decision against surrender after such consideration and examination.

Mr. Justice Strong, in his opinion affirming that decision, says:

"Upon this subject the Continental authorities "are substantially in unison. Indeed I have been "able to find no one that asserts this rule is other- "wise; only one intimates an opinion to the con- "trary. I do not propose to quote these author- "ities at length. Copious reference was made to "them by the learned Judge of the District Court, "and I shall not repeat what he has said." 17 Blatch., 234.

The brief prepared on behalf of Rollins, one of the appellants, for use in the motion to amend the Mandate which this Court refused to entertain and which it is presumed will be presented in the present argument prepared as it is with much learning and ability, is noticeable for its entire failure to cite any Continental authorities; for its references to English decisions, admittedly insular and exclusive on this subject; and for its attempt to bring the present case within the rules applicable to principal and agent and common carriers. There is one curious exception in that brief; its introduction of a decision by Judge Kane in the United States Court of the Eastern Dristict of Pennsylvania, analyzing with great vigor the whole subject of the law of the limited liability and insurance surrender in connection therewith. It completely covers all the ground, fits in the principles enunciated by Boulay Paty, and quotes with much effect the key notes struck by him. It seems strange that since its enunciation any legal mind could find doubt upon the subject. A few extracts are given:

"If the vessel has ceased to exist; if the wreck "was complete and there is no longer property in "her or her remains for any one, the owner's inter- "est is gone. He has nothing to surrender. There

"is not a word in the Act about the insurance "moneys which he has received or might claim, "these are not his interest in the vessel. The "policy of insurance is a distinct independent sub- "ject of property. No equity attaches upon the "proceeds of it in favor of third persons, unless "there be some contract, agreement or trust, to that "effect," * * * merely a personal contract "between the insurer and the insured, so the rights "of action which flow from it in case of loss are "strictly personal also. It is not, it never was an "interest in the thing insured. In case of total loss "the rights of the assured to recover by force of it "spring up and have their being only from the "moment when his interest in the thing has ex- "pired. But if even the vessel had continued to "exist *in specie* * * * the underwriters could "take no more under an abandonment and cession "than the assured had at the time of the loss, the "ship in their hands would be liable, primarily "still for wages, and * * * hypothecations "implied by the contract of affreightment, the "surrender or transfer contemplated by the Act of "Congress, affects the underwriter no more than did "the implied hypothecation. * * * It would "discourage insurances were we to deny to the "ship owner the benefit of the contract for which "he has paid his premium; it would discriminate to "the disadvantage of the small capitalist who must "insure with third persons, in favor of the million- "aire, whose extended means allow him to stand "his own underwriter, and who not receiving the "amount of loss from some third person would not "be called on to pay it over to the shipper; or to "the disadvantage of the prudent in favor of the "reckless." WATSON v MARKS. 2 AMER. LAW REG. 167

The *consensus* of opinion on this question of insurance surrender is complete wherever it has hitherto presented itself in the courts of the United States. In addition to the cases above cited are the decisions of Judge Brown in the Eastern District of

Michigan, (The Peshtigo, 2 Flip. Cir. Ct., R. 406,) and of Judge Nelson in the District of Massachusetts, in re steamship *City of Columbus*, as yet not reported.

## Third Point.

EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS.

The maxim finds full and forcible illustration in the language of this Honorable Court whenever the question of limited liability has come before it, and assuredly if the rule can ever accomplish exclusion, that result has been reached on the subject of insurance, and it has been excluded as a factor in or part of what determines the limitation of responsibility.

A short paragraph from the language of the Court as each successive case came up or as necessity arose for expression on the subject, is here given.

"So that it is evident that by this law the owner's "liability was co-extensive with his *interest in the* "*vessel and its freight* and ceased by his abandon- "ment and surrender of them to the parties sustain- "ing loss."

Norwich Co. *vs.* Wright, 13 Wal., 117.

"So far as the petitioner sought a limitation of "the owners liability, to the *value of the ship and* "*freight* it was free from objection and ought to "have been sustained."

The Benefactor, 13 Otto., 245.

"There is no reason in the world why the respon- "dents should not be decreed to pay *the value of* "*the ships strippings and remnants* into Court nor "why such amount should not be distributed pro "rata among the claimants."

The Scotland, 15 Otto., 35.

"It has the *freight money* in its possession and "its trustee is in a condition to gather up the *rem-* "*nants of the vessel* if it has not already been done. "The jurisdiction of the Court is not dependent at "all on the amount, but in the rightful possession "of that which is to be divided."

**Ex parte Slayton, 15 Otto., 453.**

"We only make them liable when free from per- "sonal fault for the value of their ship after the col- "lision, so that if the ship is lost their further lia- "bilty is extinguished."

**The North Star, 16 Otto., 28.**

"And, therefore, said Court having caused due "appraisement to be had of the amount or value of "the interest of said owner or owners respectively *in* "*such ship or vessel and her freight* for the voyage."

**Admiralty Rule, Supreme Court, 54.**

"On the *proceeds of said ship or vessel and* "*freight.*"

**Ibid., Rule, 55.**

"Having taken such jurisdiction and procured "control of the *vessel and freight, or their value,* "*constituting the fund to be distributed* * * it "became the duty of all Courts before which any of "such claims were presented, upon being properly "certified of the proceedings, to suspend further "action upon said claims."

**Providence & N. Y. Steamship Co. v. Hill Manf Co., 109 U. S., 578.**

A reference to this last decision of this Honorable Court almost necessitates the following extract from the opinion, clearly and emphatically expressing the rule for the construction of the law of limited responsibility, and the proper practice in its administration.

"Nevertheless the practical value of the law will "largely depend upon the manner in which it is "administered. If the Courts having the execution "of it administer it in a spirit of fairness, with the

"view of giving to ship owners the full benefit of "the immunities intended to be secured by it, the "encouragement it will afford to commercial oper- "ations (as before stated) will be of the last im- "portance; but if it is administered with a tight "and grudging hand, construing every clause most "unfavorably against the ship owner, and allowing "as little as possible to operate in his favor, the "law will be hardly worth the trouble of its enact- "ment. Its value and efficiency will also be greatly "diminished, if not entirely destroyed, by allowing "its administration to be hampered and interfered "with by various and conflicting jurisdictions."

Prov. & N. Y. S. S. Co., *vs.* Hill Manf. Co., 109 U. S., 589.

## Fourth Point.

FREIGHT AND PASSAGE MONEY.

The *Scotland* carried neither passengers nor freight to their destination (Recd. p. 15). No freight was received in advance except $11.50.

The freight so paid belonged to the shipper. There was no freight earned and consequently none to surrender.

The passage money was returned to or was expended for the passengers, including the amount paid for their carriage by the *Queen*. Such passage money was not earned by the *Scotland* and so does not come within consideration to be added to the value of her remnants.

Howland *v.* Lavinia, Pet. Adm. Dec., 126.
Griggs *v.* Austin, 3 Pick., 20.
Mulloy *v.* Backer, 5 East., 316.
Moffat *v.* East Ind. Co., 10 East., 468.
Watson *v.* Duykinck, 3 John., 335.
Lewis *v.* Marshall, 7 Mann. and Gran., 729.
Gillan *v.* Simpkin, 4 Camp., 241.

## Fifth Point.

INTEREST.

### I.

*Interest on Decree from date of collision.*

Interest is not an incident of an admiralty decree.

**Hemenway *v.* Fisher, 20 How., 260.**

In the cases cited by appellant's Counsel, in which interest is allowed as a part of the damages, a great reason for it is the delay, for which the party on whom it was imposed was responsible. That is not so here. The payment claimed by the libellants was the value of the ship, freight and cargo. Respondent did not pay that and this Honorable Court decided it was right in refusing to do so. Under such circumstances there is no propriety in imposing upon respondent a penalty for a delay of payment, when such delay was caused by the extravagant and unfounded demands of libellants.

**Redfield's Exr. *vs.* Iron Co., 110 U. S., 174.**
**Boyces' Exrs. *vs.* Grundy, 9 Pet., 290.**

### II.

*Interest on the costs in the District Court should not be allowed.*

No interest was allowed on such costs when the cause was decided and decree entered in the Circuit Court, although libellants inserted it, it was stricken out; when they appealed to this Honorable Court from the decree of the Circuit Court, they made this refusal to allow interest on costs, a subject of appeal. (Original Record, page 222, Fol. 468). The decree of the Circuit Court was affirmed so far as the question of interest on costs

was involved by the judgment of this Honorable Court, which, of course, entirely concludes the appellants on that subject.

## Sixth Point.

The decree of the Circuit Court should be affirmed with costs.

JOHN CHETWOOD,
Respt's Proctor

# U. S. Supreme Court.

OCTOBER TERM, 1885.

JOSEPH W. DYER, and others,
*Appellants,*

vs.

THE NATIONAL STEAM NAVIGATION COMPANY,
*Respondent.*

# SUPPLEMENTAL BRIEF ON RESPONDENT'S BEHALF.

JOHN CHETWOOD,
*Proctor for Respondent.*

New York:
CHARLES H. JONES & CO., PRINTERS, 114 FULTON STREET.
1885.

# United States Supreme Court.

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JOSEPH W. DYER and others,
Applts.,

*vs.*

THE NATIONAL STEAM NAVIGATION COMPANY,
Respdt.

## Supplementary Brief on behalf of Respondent.

The statute to be construed in this case is "An act to limit the liability of shipowners."

It declares that liability "shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

The rule of the general Maritime law was, "The owners of ships are responsible for the acts of the master, but they become discharged therefrom by abandoning the ship and freight."

### First.

1. Much stress has been laid by the appellants upon the word "interest" in urging their construction of the statute, which demands that insurance be included as a part of the limited amount or value.

Yet this court has held, in its decision of the main question in this case, that the rule of the statute and the admiralty rule were the same, and the word "interest" is not used in the admiralty rule, as there enunciated by this court (15 Otto 28, 29).

2. Why try to twist away from its customary meaning a word so universally understood and so frequently used among ship owners as *interest*, meaning simply the share which its holder owns in a ship, a half, a third, a quarter, or whatever it may be? Every day a merchant says, I have sold my interest in such a ship. I have bought an interest in such a ship. Is his meaning not always to express a sale or purchase of a share greater or smaller in a ship?

"A ship is usually conveyed by bill of sale or some writing of that nature to different persons in several and distinct shares, and, consequently, the several part owners thereby become tenants in common with each other of their respective shares, each having a distinct, although individual, *interest* in the whole." (Abbott on shipping, 97.) "Insurance by one part owner of a ship, in his own name merely, is not applicable to the *interest* of the others." (Phillips on Insurance, § 380.)

3. The language "interest of such owner or owners respectively," in § 3 of the act of 1851, indicates that the intent of the Legislature was that interest should mean the separate share, while the condensation in § 4283 of the Revised Statutes, although omitting the words "or owners respectively," "ship or," in conformity with the methods adopted in the revision, has no significance sufficient to give to "interest" any changed meaning.

## Second.

1. Puffendorf's rule, as quoted in Potter's Dwarris on Statutes, page 133, says: "That which helps us most in the discovery of the true meaning of the law is the *reason* of it, or the cause which moved the legislator to enact it. This ought not to be confounded with the *mind* of the law; for that is nothing but the genuine meaning of it; for the finding out of which we call in the reason of it to our assistance."

2. This Court says, in the City of Norwich, 13 Wall., 121, * * * "We see no reason why the fair, natural construction should not be given to the Act of 1851, which makes an equally broad application of the rule, and there is nothing in the reason of the thing that should lead us to evade such a construction. The great object of the law was to encourage shipbuilding, and to induce capitalists to invest money in this branch of industry."

3. Having thus expressed its opinion upon the reason and object of the law, will this Court now so construe it as to take away from a prudent capitalist his immemorial right to insure himself for his own benefit, and to protect his investment in a ship; and that when such intention of the legislature, had it existed, were easily expressed, and when the language used can be given full meaning and effect without such construction, which of itself would work the contradiction of extending liability by the Statute in a new direction, while avowedly meaning and intending to limit it.

## Third.

1. Appellants' urgent appeal is to the primitive rigidity of the common law in its regulation of carriers, holding them liable, except for acts of God and the public enemy, and appellants ask this Court to administer this gracious statute of exemption and encouragement to shipowners, according to this policy, ignoring the fact that even the then obnoxious carrier in the very home of the common law has now been released from most of his original burdens, and is allowed by contract to exempt himself from liability even for his own negligence. The same progress, away from the old doctrine, obtains in some of our own States, and notably in the State of New York, from the United States Courts sitting wherein, this present case comes up on appeal before this Court.

2. This Court, although holding in the Lockwood case that a broad exemption from liability for negligence is void, has greatly modified and mitigated the position in which carriers stood under the common law, and in a recent case has held that they may, by contract, limit the amount of their liability in case of damage, although caused by their own negligence. (Hart *vs.* Penn. R. R. Co., 112 U. S., 331.)

## Fourth.

Appellants urge as a consideration constraining the forced construction they would impose on the statute, the "rigid liability" imposed by law and policy on the carrier "in respect to the acts of his agents and servants," and yet it is the conceded intent and policy of the statute and the maritime

law to relieve the shipowner *pro tanto* from responsibility for the acts of his agents and servants, to wit: his captain and crew, and to modify in behalf of such owner the doctrine of *respondeat superior*.

## Fifth.

"*Relaxation*" of the rule in respect of carriers by water is a very mild and inadequate expression for the total change of policy intended and effected by the English statute and our own. This court has cheerfully recognized, emphasized and made effectual that change. The new policy has been heartily and logically administered and rules formulated, and an elastic practice adapted for its full development.

## Sixth.

This Court, "reasoning from grounds of public policy and imputing to Congress the intent to act in accordance therewith," has fixed a time after the collision for determining the value of the ship as the limit of liability. A great advance in the shipowner's favor beyond the English statute, as construed by English courts fixing that time, immediately before the collision, and most significant on the question of insurance.

If insurance were to be considered a part of surrender value, the time to set logically for the ascertainment of value was while the ship was yet alive with the policy incidental so far as possible to the ship.

## Seventh.

Has this court ever decided that a carrier cannot be protected by insurance against loss which he has been compelled to pay consequent upon his want of diligence, and is the assumption of this negative by appellants quite safe?

The contrary has been held in the Federal Circuit Courts.

Rintoul *v.* N. Y. Central R. R., 17 Fed. R., 905.
Carstairs *vs.* Mech. and Traders' Ins. Co., 18 Fed. Rep., 478.
Phœnix Ins. Co. *vs.* Erie & West'n Trans. Co., 10 Biss. C. Ct., 18.

## Eighth.

1. These respondents are not wrongdoers; this Court has so decided in this suit; the collision was without our privity or knowledge. We are innocent sufferers, protected, as we properly are, and legally may be, by insurance effected for our benefit. Appellants in the third subdivision of their 4th original point introduce, with much iteration the word "guilty." The ship may have been guilty—her navigators concededly were—but that gives appellants no right to the insurance money of the innocent.

2. The statute saved to appellants a right of action against the actual wrongdoers (U. S. Rev. Stat., § 4287).

3. A plainly expressed statute cannot be diverted from its meaning, or defeated in its intent because wicked men, ready for crime, may possibly conspire to reap some benefit from it. The captain, under the temptation supposed, will be restrained by the desire of self preservation, by the apprehension of legal actions or criminal punishment. The logical

result of the one-sided reasoning introduced in this subject, when applied at large to insurance, would root it up entirely, because it is always a temptation to barratry.

## Ninth.

It is conceded by appellants that policies of insurance are not negotiable, and do not pass as incidental to the subject of insurance ; respondents concede that, if it be agreed between parties that insurance should pass with transfer of property, it becomes incidental to the subject of property ; they can hardly go to the extent of conceding this, however, on mere *contemplation.* It seems, however, a *non sequitur* that insurance effected by the owners of a ship for their own benefit should be diverted to pay a lien on the ship for damages in consequence of a collision, and it would seem like begging the question to impute any such intent under such circumstances. Appellants in this point stick to the mistaken position that negligence is imputable to the owners, and that they are not sufferers, and that it was they who inflicted the damage.

## Tenth.

It does not seem apparent that a party who has insured himself against a possible loss by reason of the mistakes or negligence of his servants should be assumed to stand as a trustee for the benefit of somebody else who has also suffered a loss from the same mistakes or negligence, especially when the policy of the law is to extend protection under the circumstances to the master.

## Eleventh.

If there were any such relations as appellants contend for between the shipowners and the sufferers from a collision by the fault of the ship's navigators would there not be a correlative duty imposed upon the owners? Could they insure or not as they preferred, would they not be bound in equity at least to insure for the benefit of the possible sufferers? Yet appellants concede to the owners freedom to insure or not.

## Twelfth.

There is a mistake in the assertion that appellants have no knowledge of the form of the policy effected by the respondents; the Record, p. 13, shows that the loss was payable to the assured.

## Thirteenth.

Why does not insurance itself solve the entire difficulty and meet all the equities. It is a business carried on at a profit, otherwise it would not exist. The innocent owner of the colliding ship may protect his investment, which possibly is his entire patrimony, by insurance; the owner of the ship collided with may protect his marine investment, by insurance. The collision occurs, the sufferer on each side gets what he paid for from the underwriters, who cannot complain when once called to respond by a loss, after premiums by the hundred received and enjoyed without any loss to pay.

## Fourteenth.

The present case is simplicity itself. The Scotland gets her death blow in the collision which sinks the Dyer. She turns at once and makes for a port of refuge, and sinks before she reaches it. Remnants of wreck are saved. There is no subsequent collision involving other interests—there is no subsequent mischance or mistake in navigation to be considered. The literal application of the statute is easy, its construction is plain, and there are no equities appealing to this Court to hesitate in such application or construction.

## Fifteenth.

The decree of the Circuit Court should be affirmed, with costs.

JOHN CHETWOOD,
Proctor Respondent.

118-507

118-507

# Supreme Court of the United States.

JOSEPH W. DYER, and others,
*Appellants,*

vs.

THE NATIONAL STEAM NAVIGATION COMPANY,
*Respondent.*

# Extracts from Bédarride submitted on the part of the Respondent.

JOHN CHETWOOD,
*Proctor for Respondent.*

New York:
CHARLES H. JONES & CO., PRINTERS, 114 FULTON STREET.
1885.

## ARTICLE 216 (CODE DE COMMERCE).

Tout propriétaire de navire est civilement responsable des faits du capitaine, et tenu des engagements contractés par ce dernier, pour ce qui est relatif au navire et à l'expédition. Il peut, dans tous les cas, s'affranchir des obligations ci-dessus, par l'abandon du navire et du fret.

268.—Le droit romain, appliquant à la navigation le principe du droit commun, s'était prononcé pour la responsabilité indéfinie et absolue. Actes, fautes, délits, quasi-délits du capitaine, tout réfléchissait contre le propriétaire et obligeait sa fortune entière : *Omnia enim facta magistri debet præstare qui eum præposuit ; alioquin contrahentes, decipientur. Æquum fuit, eum, qui magistrum præposuit, teneri, ut tenetur qui institorem tabernæ vel negotio præposuit.*[1]

Ainsi, aucun doute ne pouvait s'élever, du moins sur les engagements contractés par le capitaine. L'intérêt des tiers avait paru le commander ainsi.

Une pareille solution pouvait singulièrement entraver le développement de la navigation. Le peu d'essor du commerce maritime chez les Romains explique jusqu'à un certain point que leur législateur ne se soit pas trop préoccupé de ce danger.

Mais il n'en fut pas ainsi des nations commerçantes de la Méditerranée. Ainsi voyons-nous le *Consulat de la mer* restreindre la responsabilité des propriétaires. Il la limitait, même pour les engagements du capitaine, au navire et au fret, soit que le navire vint à périr, soit, qu'arrivé au port, sa valeur fût insuffisante pour remplir ces engagements.

Cependant le Nord et notamment la Suède n'acceptèrent pas cette règle. La loi du Wisbuy se conforma au principe du droit romain, et, comme lui, consacra la responsabilité indéfinie.

[1] L. 1, § 5, Dig. *de Exercit. act.*

ARTICLE 216 (CODE DE COMMERCE.)

"Every shipowner is civilly responsible for the acts of the captain and held for the engagements contracted by him for whatever relates to the vessel and the voyage. He may in every case free himself from such obligations by the abandonment of ship and freight." (1 Bédarride du Commerce Maritime, 324.)

§ 268.—The Roman law applying to navigation the principle of the common law pronounced for responsibility unbounded and absolute. The acts, the faults, the crimes or quasi crimes of the captain all rebounded upon the shipowner and bound his entire property: *Omnia enim facta magistri debet præstare qui eum præposuit; alioquin contrahentes, decipientur. Æquum fuit, eum, qui magistrum præposuit, teneri, ut tenetur qui institorem tabernæ vel negotio præposuit.* Ibid. 328.

In this way no doubt could arise, *at least*, upon the engagements contracted by the captain the interest of third parties seemed so to command. Such a solution was of singular power to fetter the development of navigation. The short flight of maritime commerce among the Romans explains to a certain point why their legislator was not greatly preoccupied with that danger. But it was not so among the commercial nations of the Mediterranean. So we see the Consulat de la Mer restricting the responsibility of shipowners. It limits it, even for the engagements of the captain, to the ship and freight, whether the ship perished, or whether arrived in port, its value was insufficient to fulfill those engagements.

Nevertheless, the North, and notably Sweden, did not accept that rule. The law of Wisbuy conformed to the principle of the Roman law, and like it sanctioned indefinite responsibility.

270.—L'ordonnance de 1681 avait donc à faire un choix entre les deux systèmes. Elle parut préférer celui du *Consulat*, puisque l'article 2 du titre 8 du deuxième livre, tout en proclamant la responsabilité du propriétaire, lui permit de s'en affranchir par l'abandon du navire et du fret.

Mais alors naquit la question de savoir à quoi s'appliquait la faculté d'abandon. Ne se bornait-elle pas à la responsabilité des délits ou quasi-délits du capitaine ? Pouvait-elle comprendre celle naissant d'engagements contractés légalement par le capitaine ?

Valin, dominé par les principes du droit romain, s'efforçait de mettre l'ordonnance en harmonie avec cette législation. Il enseignait donc que la faculté de faire abandon pour se libérer de toute responsabilité ne pouvait être admise qu'à l'endroit des obligations illicites du capitaine. Il est evident, disait-il, que s'il s'agit de dettes contractées par le capitaine pour cause qui ont réellement tourné au profit du navire, alors que le navire arrive à bon port ou non, l'armateur ne peut se dispenser de payer.[1]

Émérignon tenait pour l'opinion contraire. L'action en responsabilité, disait-il, ne compète contre les propriétaires que jusqu'à concurrence de l'intérêt qu'ils ont sur le corps du navire. De sorte que, si le navire périt ou qu'ils abdiquent leur intérêt, ils ne sont garants de rien. On voit par-là, ajoutait-il, que l'obligation où les propriétaires sont de garantir les faits de leur capitaine, est plutôt réelle que personnelle. *Pendant le cours du voyage*, le capitaine *pourra*, pour les nécessités du bâtiment prendre deniers *sur le corps*, mettre les apparaux en gage, ou vendre des marchandises de son chargement (*article 19, titre du Capitaine*). Voilà tout. Son pouvoir légal ne s'étend pas au-delà des limites

[1] Art. 2, titre *des Propriétaires*.

§ 270.—The ordinance of 1681 had then to make a choice between the two systems. It appeared to prefer that of the Consulat since 2d article, 8th title, 2d book, while proclaiming the responsibility of the shipowner permitted him to free himself by abandonment of vessel and freight. Ibid. 329.

Then arose the question, to what the power of abandonment should apply. Should it not be limited to responsibility for crimes or quasi crimes of the captain? Could it comprehend that arising from the engagements legally contracted by the captain?

Valin, dominated by the principles of the Roman law, forced himself to put the ordinance in harmony with that legislation. He taught then that the power to make abandonment to free from all responsibility could only be admitted in the matter of the obligations of the captain illegally contracted. It is evident, he said, that if it concerns debts contracted by the captain for things which have really turned out to the profit of the ship, then whether the ship arrives safely in port or not, the shipowner cannot absolve himself from payment.

Émérigon held to the contrary opinion. The action to make responsible is not competent against the owners beyond the amount of their interest in the hull of the ship, so that if the ship perish or they surrender their interest they are guarantors of nothing. We see by that, added he, that the obligation upon the owners to guarantee the acts of their captain is rather real than personal. During the course of the voyage the captain can, for the necessities of the vessel, borrow money on the hull, put the apparel in pledge, or sell the merchandise of the cargo. That is all; his lawful power does not extend beyond the sides of the ship of which

du navire dont il est le *maître*, c'est-à-dire administrateur. Il ne peut engager la fortune de terre de ses armateurs, qu'autant que ceux-ci y ont consenti d'une manière spéciale.[2]

271.—L'opinion d'Émérigon avait prévalu dans la pratique, et cette pratique ne discontinua point sous l'empire du Code. On crut même qu'elle avait été formellement consacrée par l'article 216, que le législateur de 1807 avait conçu en ces termes : Tout propriétaire de navire est civilement responsable des faits du capitaine, pour ce qui est relatif au navire et à l'expédition ;

La responsabilité cesse par l'abandon du navire et du fret.

On suivit, en conséquence, les anciens errements. Doctrine et jurisprudence se prononçait dans ce sens, lorsque la Cour de cassation vint condamner cette interprétation. Trois fois saisie de la question, elle décide trois fois que l'article 216, qui décharge le propriétaire d'un navire de la responsabilité civile des faits du capitaine, moyennant l'abandon du navire et du fret, ne concerne que ceux des engagements du capitaine qui résultent soit de sa faute, soit d'un délit ou d'un quasi-délit, et non ceux qu'il a contractés légalement.

La responsabilité dont on peut s'exonérer par l'abandon du navire et du fret, disait la cour de cassation, est qualifiée par la loi elle-même de responsabilité *civile*. Or, celle-ci n'existe que pour les fautes, délits ou quasi-délits de celui qu'on emploie. Elle ne saurait s'appliquer aux actes faits légalement dans l'exercice du mandat. La responsabilité est alors directe et positive, le mandant étant présumé avoir agi lui-même.[1]

[2] *Contr. à la grosse*, chap. IV, sect. XI. §§ 1 et 2.

[1] 16 juillet 1827 ; 14 mai 1833 ; 1er juillet 1834.

he is master, that is to say, the administrator. He cannot involve the land fortune of his owners except to the extent to which they have consented in a special manner.

§ 271.—The opinion of Émérigon prevailed in practice and that practice did not discontinue under the empire of the Code. We believe, indeed, that it was formally established by article 216, which the legislator of 1807 expressed in these terms: Every shipowner is civilly responsible for the acts of the captain for whatever relates to the ship or the voyage. The responsibility stops with the abandonment of the ship and freight. It follows, consequently, the ancient precedents. Principle and jurisprudence had pronounced for that meaning when the Court of Cassation came in to condemn this interpretation. Taking up the question three times, three times it decided that Article 216, which discharges the shipowner from civil responsibility for the acts of the captain upon condition of abandonment of ship and freight only reaches those obligations of the captain, which are the result of his fault, be it a crime or quasi crime, and not those legally contracted.

The responsibility from which it is possible to be exonerated by abandonment of ship and freight, said the Court of Cassation, is qualified by the law itself as civil responsibility. Now this only exists for the faults, crimes or quasi crimes of the employee. It does not apply to acts legally done in the exercise of the employment; the responsibility is then direct and positive, the principal being presumed to have acted himself. Ibid. 330.

272.—L'arrêt de la Cour d'Aix, qui faisait l'objet du pourvoi jugé le 1er juillet 1834, exposait avec netteté les motifs de se prononcer pour la responsabilité restreinte dans tous les cas. Après avoir rappelé la doctrine d'Émérigon, et constaté une parfaite identité dans les dispositions du Code et celles de l'ordonnance, il concluait qu'on ne pouvait décider sous l'empire de celui-ci que ce qu'on admettait sous l'autre ; que cette doctrine était équitable et juste ; que l'armateur qui expédie un navire sait très bien qu'il peut le perdre, mais il n'a jamais entendu perdre autre chose ;

Qu'en droit, on ne pouvait exciper des principes ordinaires sur le mandat, puisque la loi spéciale règle la position du capitaine et du propriétaire ; qu'on doit donc s'en référer exclusivement à ses dispositions ;

Qu'en fait, le mandat du capitaine est bien différent du mandat ordinaire ; que le capitaine ne peut être pris que dans une classe d'individus ;

Qu'il contracte toujours en son nom et jamais au nom du propriétaire et comme son mandataire ;

Que ses pouvoirs ne sont pas déterminés par les prétendus mandants, mais uniquement par la loi ;

Qu'enfin, le capitaine est toujours premier obligé, le propriétaire-armateur n'est que civilement responsable, tandis que, dans le mandat ordinaire, le mandataire n'est pas tenu, et le mandant est seul obligé ;

Que, d'ailleurs, cette responsabilité civile ne doit s'entendre que de l'absence de toute action personnelle contre le propriétaire, même pour les engagements légitimement contractés ; ce qui prouvait bien que l'abandon couvrait ceux-ci comme tous les faits illicites.

Mais ces considerations échouèrent. La Cour de cassation les repoussa en 1834, comme elle les avait repoussées en 1827 et en 1833.

§ 272.—The decision of the Court of Aix, which was the occasion of the appeal decided July 1, 1834, expresses succintly its reasons for pronouncing in favor of restricting liability in every case. After having recalled the doctrine of Émérigon and established a perfect identity between the provisions of the Code and the ordinance, it concludes that it is impossible to decide under the authority of the one except as admitted under the other; that the doctrine was equitable and just; that the shipping merchant who sends out a ship knows very well what he can afford to lose, but has never understood that he was to lose anything else; that properly exception cannot be taken according to the ordinary rules of agency, since a special law regulates the positions of master and owner which must be referred to exclusively for their disposal; that, in fact, the agency of the captain is very different from the ordinary agency; that the captain can only be found in a special class; that he contracts always in his own name, and never in the name of the owner as his agent; that his powers are not determined by his alleged principals, but by the law; that, finally, the captain is always first bound; that the outfitting shipowner is only civilly responsible, while in the ordinary agency the agent is not held and the principal is alone bound; that, moreover, that civil responsibility ought not to be taken for granted, except in the absence of all personal right of action against the owner even for engagements legitimately contracted, which well proves that abandonment should cover these as well as all unlawful acts. But these considerations failed, and the Court of Cassation rejected them in 1834 as in 1827 and 1833. Ibid. 331.

273.—Cette jurisprudence était on ne peut pas avantageuse aux capitalistes et aux chargeurs. Mais elle renfermait un danger si sérieux pour les armateurs, qu'elle devait être un obstacle au développement de la navigation. Comment se résoudre, en effet, à confier la disposition de sa fortune entière à la discrétion d'un capitaine, quelque habile, quelque honnête qu'il parût.

Aussi ce troisième arrêt fit-il naître de telles réclamations que, dès 1839, un projet de loi était soumis au pouvoir législatif pour donner à l'article 216 l'interprétation que la Cour suprême ne croyait pas pouvoir lui donner. Le besoin de se livrer à des investigations nombreuses sur une question aussi grave fit d'abord retirer le projet qui fut représenté, discuté et adopté en 1841.

Il n'est pas sans intérêt de rappeler que les investigations qui se portèrent sur les législations étrangères constatèrent que le principe de l'éfficacité de l'abandon dans tous les cas était consacrée en Italie, qui se régissait par le *Consulat de la mer*, par le statut de Hambourg, par le Code de commerce des Pays-Bas, par la loi maritime de la Suède, par le Code du Dannemark ;

Que la distinction admise par la Cour de cassation, écrite dans le statut de Wisbuy, se trouvait dans les Codes de commerce d'Espagne, de Prusse et de Naples ; enfin, qu'en Angleterre et aux Etats-Unis, les précédents et les usages étaient dans le même sens.

L'example de ces deux dernières nations prouve que cette distinction n'a rien d'absolument antipathique aux mœurs commerciales. Pourtant elle est devenue pour le commerce Français l'objet d'une répugnance invincible. C'est ce que va nous apprendre l'exposé des motifs de la loi de 1841.

§ 273.—This jurisprudence was not any more to the advantage of capitalists or shippers, but it involved a danger so serious for outfitting shipping merchants that it became an obstacle to the development of navigation. How reconcile one's self in effect to confide the disposition of his entire fortune to the discretion of a captain, however qualified or honest he might appear? Ibid. 333.

Moreover, this third decision raised such complaints that from 1839 a proposed law was submitted to the legislature to give to article 216 the interpretation which the Supreme Court believed itself unable to give. The necessity to make numerous investigations upon so grave a question at first caused the withdrawal of the proposed law which was again presented, discussed and adopted in 1841. It is not without interest to recall that the investigations which were carried into foreign legislation established that the principle of the efficiency of abandonment in every case was established in Italy, by the Statute of Hamburg, by the Code of Commerce of the Low Countries, by the Maritime Law of Sweden, by the Danish Code; that the distinction admitted by the Court of Cassation written in the Code of Wisbuy is found in the Commercial Code of Spain, Prussia and Naples, and, finally, that in England and the United States the precedents and practice were similarly understood. The example of these two last nations proves that distinction has nothing absolutely antipathetic to commercial customs. Nevertheless, it became for French commerce an object of invincible repugnance. This is what the disclosure of the reasons for the law of 1841 teaches us.

274.—" On a prétendu, disait le ministre, que les propriétaires de navires se trompaient sur leurs véritables intérêts. Si la mesure qu'ils solicitent est adoptée, leurs capitaines, a-t-on dit, ne trouveront plus à emprunter en cours de voyage pour subvenir aux besoins du navire, ou, si l'on consent à leur prêter, ce ne sera que par la voie onéreuse du contrat à la grosse. Ils auront, il est vrai, la ressource de vendre les marchandises pour se procurer des fonds, mais la perte retombera sur les chargeurs, puisque ceux-ci n'auront d'autre garantie que la valeur souvent insuffisante du navire et du fret.

" Qu'on se rassure. La loi n'aura pas ces effets désastreux.

" Remarquons d'abord que tous les organes légaux du commerce réclament avec vivacité et persévérance la mesure sur laquelle vous êtes appelés à délibérer. Les chambres et le conseil supérieur de commerce sont unanimes ; les Cours royales consultées se sont prononcés dans le même sens, à une grande majorité.

" Comment se fait-il que tant d'hommes spéciaux, tant d'esprits éclairés fussent dans l'erreur, et que leur aveuglement fût poussé à ce point que, pour soustraire les armateurs à quelques chances trop onéreuses, ils vinssent provoquer une loi qui les exposerait à ne plus troveer d'affréteurs ?

" On peut être également certain que les chargeurs ne sont point sacrifiés par l'établissement d'une règle en faveur de laquelle s'élèvent les graves autorités que nous venons d'indiquer. Les chambres de commerce, même dans les ports de mer, comptent dans leur sein au moins autant de chargeurs que d'armateurs ; celles des villes de l'intérieur n'ont point parmi leurs membres des propriétaires de navires, et toutes, sans exception, tiennent le même langage."

§ 274.—"They pretend," said the Minister, "that shipowners deceive themselves about their true interests. If the measure they ask is adopted, their captains, it is said, will not be able to borrow in the course of the voyage to provide for the necessities of the ship, or if people do consent to lend them it will only be in the onerous way of bottomry. They will have, it is true, the resource of selling their cargo to procure funds, but then the loss will fall on the shippers since they have no guaranty except the value, often insufficient, of the ship and freight. Let them reassure themselves; the law will not have these disastrous effects. Ibid. 334.

"Let us first remark that all the legal organs of commerce implore warmly and perseveringly this measure upon which you are called to deliberate. The chambers and superior councils of commerce are unanimous. The royal courts consulted have pronounced to the same effect by a great majority.

"How could it be that so many professionals, so many well informed minds should be in error, and that their blindness should be pushed so far that to deliver the shipowners from some too burdensome risks they want to promote a law which might expose them to the entire loss of freighters?

"It is equally certain that the shippers are not sacrificed by the establishment of a rule in favor of which the weighty authorities have asserted themselves as we have indicated. The chambers of commerce even in the seaports embrace at least as many shippers as ship owners; those of the towns in the interior have not among their members shipowners, and all without exception hold the same language."

Le ministre avait raison d'ajouter que cette importante unanimité d'opinion, à qui tant de confiance est due, semblait rendre toute discussion impossible. Cependant il n'en fut pas ainsi ; mais l'opposition que le projet rencontra dans l'une et l'autre chambre fut facilement vaincue.

Sans doute, dans le but d'éviter toutes difficultés, le projet de loi avait omis le mot *civilement*, mais il fut rétabli par la chambre des pairs, sur la proposition de M. Persil. Mais les explications données par l'honorable pair ne permettaient plus l'interprétation qu'en faisait naguère la Cour de cassation. "L'armateur, disait M. Persil, ne peut être indéfiniment responsable des faits du capitaine. Par exemple, si celui-ci a commis a fait un act de piraterie, la loi ne pouvait étendre à l'armateur la peine que le Code prononce contre la piraterie, ce dont pourrait faire douter la suppression du mot *civilement*, son rétablissement ne fut consacré que pour dissiper ce doute."

275.—Il résulte donc de l'article 216 actuel que les propriétaires des navires sont responsables des faits de leur capitaine. Mais cette responsabilité, qu'elle se réfère à des actes licites ou illicites, cède par l'abandon du navire et du fret. Dans aucun cas le capitaine n'a pu engager que le navire et son produit, qui seuls répondent de ses engagement.

284.—Enfin le propriétaire condamné a toujours le moyen de se soustraire aux effets de sa condamnation, en abandonnant le navire et le fret. La loi de 1841 a définitivement tranché toute controverse à cet égard ; qu'il s'agisse d'un contrat, ou des conséquences d'un fait, d'une faute, d'un délit même, l'abandon du navire et du fret libère intégralement le propriétaire.

The Minister was right in adding that that important unanimity of opinion to which so much confidence is due seemed to render all discussion impossible. Nevertheless, it was not so, but the opposition which the law encountered in either chamber was easily overcome. Without doubt to avoid all difficulties the word *civilement* was omitted from the proposed law, but it was replaced in the Chamber of Peers upon motion of M. Persil. However, the explanations given by the honorable peer would permit no longer the construction lately adopted by the Court of Cassation. "The outfitting, owning, shipping merchant," said M. Persil, "cannot be responsible without limit for the acts of the captain. For example, if he commits an act of piracy the law cannot extend to such shipowner the penalty pronounced by the code against piracy; that which the suppression of the word *civilement* left in doubt, its replacement was only adopted to dissipate that doubt."

§ 275.—The result then of article 216 is that ship owners are responsible for the acts of their captain. But that responsibility, whether it relates to lawful or unlawful acts, ceases upon the abandonment of the ship and freight. In no case is the captain able to bind more than the ship and its product, which alone are bound for his engagements. Ibid. 336.

§ 284.—Finally, the shipowner condemned has always the means to release himself from the effects of the condemnation in abandoning the ship and freight. The law of 1841 has definitely put a stop to all controversy in that regard. Whether under a contract, or as the consequences of an act, a fault or a misdemeanor even, the abandonment of the ship and freight frees entirely the owner. Ibid. 347.

291.—Mais ce principe reçoit exception dans le cas où la perte du navire est le résultat d'une fortune de mer. Elle n'est plus alors un obstacle à l'abandon, et le propriétaire poursuivi peut le réaliser encore, alors même qui au lieu d'être seulement innavigable, le navire aurait été englouti dans les flots.

Il y a mieux encore dans cette hypothèse, l'abandon peut être réalisé même après le delaissement aux assureurs. Cette règle aujourd'hui unanimement admise en doctrine et en jurisprudence, est fondée sur les caractères et les effets respectifs de l'abandon et du délaissement.

Le premier n'est jamais translatif de propriété, ce qui en résulte est pour le propriétaire du navire la libération de toutes les obligations, de tous les faits contractés par le capitaine ou commis par lui ; pour les créanciers, c'est le cantonnement de leurs droits qui ne changent pas de nature et qui restent, après comme avant l'abandon, des simples droits de créance.

Le délaissement, au contraire, confère aux assureurs la propriété des choses qui en font la matière. Mais cette propriété n'est transférée que dans l'état où elle se trouve au moment du delaissement, et les assureurs, substitués au droit des propriétaires, se trouvent également substitués a toutes leurs obligations.

La raison juridique de cette double substitution, c'est que par la réalisation du sinistre faisant l'objet de l'assurance, les assureurs prennent la place de l'assuré dès le commencement du voyage. C'est pour leur compte et à leurs risques et périls que le voyage est présumé s'être accompli, que le navire a navigué, ils doivent donc satisfaire à toutes les charges dont cette navigation et ce voyage sont devenus l'origine. Ils répondent des faits du

§ 291.—But this principle (that there must be an object for abandonment) has an exception when the loss of the ship is the result of a sea risk. There is then no longer any obstacle to an abandonment and the ship owner may yet effect it even when instead of being only unfit for navigation, the ship shall have been actually swallowed by the waves. Ibid. 355.

Even further, in this case the abandonment can be made after the surrender to the underwriters. That rule, to-day, uniformly admitted on principle and in jurisprudence, is founded upon the respective character and result of abandonment and surrender. The first is never a transfer of the property, the result of which for the shipowner is his liberation from all the obligations of all the agreements made by or acts committed by the captain ; for the creditors it is the putting together of their rights, which do not change in character and remain after, as before the abandonment, simple credit rights.

The surrender, on the contrary, confers upon the underwriters the property in things of which it makes the subject. But that property is only transferred in the state found at the time of the surrender, and the underwriters substituted to the rights of the shipowners find themselves equally substituted to all their obligations. The legal reason for that double substitution is that by the fact of the disaster insured against the insurers, take the place of the insured from the commencement of the voyage. It is for their account and at their risk and peril that the voyage is presumed to have been accomplished, that the ship has been navigated ; they ought then to satisfy all the charges to which that navigation and voyage have given rise. They respond, for the acts of the captain becomes theirs and are not able in their turn to free themselves from

capitaine, devenu le leur, et ils ne peuvent à leur tour se libérer des effets de cette responsabilité que comme l'assuré aurais pu le faire lui-même c'est-à-dire par l'abandon du navire et du fret.

En réalité, donc, le délaissement ne fait que substituer un débiteur à un autre, l'abandon arrivant après n'est que le moyen offert aux créanciers de se faire payer par le débiteur nouveau contre lequel ils ne sauraient recourir qu'après l'abandon. Le délaissement n'occasionne donc aucun grief, aucun préjudice aux créanciers, car la chose sur laquelle ils ont seulement à exercer leurs droits, ils la trouveront aux mains des assureurs dans l'état même où elle se serait rencontrée entre les mains du débiteur primitif, et ils pourront l'exécuter comme ils auraient pu le faire avant le délaissement.

Le navire et le fret doivent donc être abandonnés aux créanciers. mais c'est là tout, et ceux-ci ne peuvent, dans aucun cas, exiger autre chose. Ainsi, si le propriétaire du navire était en même temps propriétaire de la cargaison, il ne serait pas tenu d'abandonner celle-ci, les créanciers ne pourralent ni la saisir, ni la faire vendre, tout ce qu'ils seraient fondés à exiger, c'est le fret que cette cargaison aurait eu à payer si elle avait été réaliséee par un étranger. Le prix de ce fret serait facilement établi par le cours de la place au moment du chargement.

295.—Dans les observations que suscita la presentation du projet de loi de 1841, quelques Cours, notamment celle d'Aix, demandait que l'abandon comprit, outre le navire et le fret, le montant de l'assurance que le propriétaire aurait contractée. Cette prétention. qui s'était déjà produite devant les tribunauq,. avait été formellement condamné. L'assurance, avait dit la Cour de Rennes, est le prix de la prime payée par l'assuré, et ce prix ne peut

the results of that responsibility except as the insured could himself have done; that is to say, by the abandonment of ship and freight.

In reality, then, the surrender has only substituted one debtor for another; the abandonment taking place afterwards is only a means offered to the creditors to get their pay from the new debtor to whom they can only have recourse after the abandonment. The surrender occasions then no trouble, no prejudice to the creditors, for the thing upon which alone they can exercise their rights, they will find in the hands of the underwriters in the same state in which it would be found in the hands of the original debtor himself, and they may proceed against it as they might have done before the surrender.

§ 294.— * * * The ship and freight ought then to be abandoned to the creditors. But that is all, and these can in no case demand more. So if the shipowner was at the same time owner of the cargo, he would not be held to abandon this; the creditors could not seize it nor have it sold. All that they can demand is the freight which that cargo would have paid if it had been the property of a stranger. * * * Ibid. 358.

§ 295.—In the discussions which the presentation of the proposed law of 1841 excited, some Courts, notably that of Aix, demanded that the abandonment should include beyond the ship and freight the insurance which the shipowner had effected. This pretension, which had been already produced before the Courts, had been formally condemned. "Insurance," said the Court of Rennes, "is the

être affecté à la garantie des obligations contractées par le capitaine, auxquelles la loi n'affecte expressément que le navire et le fret.[1]

Quoi qu'il en soit, la proposition fut reproduite avec force à la chambre des pairs. Son adoption devait, disait-on, préserver les prêteurs et chargeurs des conséquences d'un concert, entre le capitaine et l'armateur, désintéressé par l'assurance, pour emprunter ou vendre des marchandises, à l'effet de réparer un bâtiment sans valeur réelle.

Mais cette proposition ne fut pas accueillie, l'opinion de la majorité, telle qu'elle résulte de la discussion, fut que les rapports établis entre le propriétaire du navire et les prêteurs ou chargeurs devaient demeurer tout-à-fait indépendants des contrats d'assurance que chacun d'eux pouvait passer ; que l'obligation d'abandonner le montant de l'assurance ne tendrait à rien moins qu'à interdire l'assurance du navire à l'armateur déjà privé du droit de faire assurer le fret, car ce serait bien lui interdire cette assurance que de lui en retirer le bénéfice ; qu'un tel système rendrait la loi nouvelle stérile pour les armateurs.

La crainte d'un coucert coupable entre the capitaine et l'armateur parut peu fondée ; d'une part, en effet, le propriétaire du navire, qui ne peut faire assurer le fret ni les gages des gens de mer, n'est pas complètement désintéressé par l'assurance ; le fût-il, en faisant assurer le fret à l'étranger, il ne faut pas oublier que le concert frauduleux qu'on redoute ici entraînerait pour l'armateur une responsabilité dont il ne serait pas permis de s'affranchir par l'abandon du navire et du fret ; car la fraude, comme on sait, fait exception à toutes les règles ; une pareille fraude d'ailleurs constituerait une véritable baraterie, et il n'est pas permis de

[1] Rennes, 12 mai 1822.

price of the premium paid by the insured, and that price cannot be reached as a guaranty of obligations contracted by the captain, which the law expressly extends only to ship and freight." Nevertheless, the proposition was reproduced with energy in the Chamber of Peers. Its adoption ought to, it was said, preserve lenders and shippers from the consequences of combination between captain and outfitting owner, made indifferent by insurance, to borrow or to sell cargo for the purpose of repairing a vessel without substantial value. But that suggestion was not entertained; the opinion of the majority as the result of the discussion was that the relations established between the shipowner and lenders or shippers ought to remain entirely independent of contracts of insurance which either could make. That an obligation to abandon insurance had no other tendency than to interdict insurance by the owner, already deprived of the right to insure freight, for it was, in fact, to forbid him to insure if the benefit of insurance was taken from him, and that such a system would make the new law sterile for shipowners. Ibid. 359.

The fear of culpable combination between captain and owner appeared to have little foundation. For one thing, the shipowner, who cannot insure freight or wages, is not made indifferent by insurance. Were it so in effecting insurauce on freight abroad, it must not be forgotten that the fraudulent combination which is apprehended would draw down on the owner a responsibility from which he would not be suffered to relieve himself by the abandonment of ship and freight, for fraud, as all know, makes an exception to all rules. Such a fraud, moreover, would constitute a veritable act of barratry, and it is not permitted to suppose that a shipowner would willingly expose himself to the

supposer qu'un armateur voulût s'exposer aux peines terribles que nos lois ont infligé à ce crime.

296.—L'abandon a pour effets :

1o De libérer le propriétaire du navire de la resposabilité de tous engagements contractés ou encourus par le capitaine, sans distinction entre l'emprunt, la vente des marchandises et la faute, le délit ou le quasi-délit ;

2o de libérer le capitaine lui-même, toutes les fois qu'ayant contracté en sa seule qualité, il n'a pris aucune obligation personelle. Or celle-ci résultant toujours de la faute du délit ou du quaisi-délit, le capitaine, auteur de l'un ou de l'autre, n'en reste pas moins obligé, malgré l'abandon ;

3o. De réduire les créanciers à l'unique faculté de poursuivre leur payement sur la chose abandonnée. Cet effet se produit d'une manière absolue, et envers tous. Ainsi l'abandon réalisé envers un créancier met le propriétaire à l'abri de toute action de la part de ceux qui réclameraient ultérieurement. Il n'existe plus pour eux qu'une action en quelque sorte réelle, et ils ne peuvent exercer leurs droits que sur le navire abandonné ou sur le prix de la vente qui en a été faite.

## ARTICLE 191—CODE DE COMMERCE.

10o Le montant des primes d'assurances faites sur le corps, quille, agrès et apparux, et sur armement et équipement du navire, dues pour le dernier voyage ;

127.—On serait tenté d'en adresser un autre à l'article 191, celui d'avoir relégué au deuxième rang le privilége des assureurs qui conserve le prix, à défaut de la chose. Mais, en fait, cette conservation n'offre aucun avantage à la masse privilégiée, nous verrons en effet sur l'article suivant que les priviléges, quels qu'ils soient, sont éteints par la perte de la chose et n'affectent jamais le montant de l'assurance. Cette masse ne pouvait dès-lors être

terrible punishment which our laws inflict on such a crime.

§ 296.—Abandonment has for effect,

1st. Liberation of the owner from all responsibility for engagements contracted or incurred by the captain, without distinction between borrowing, sale of cargo, or tort, crime, or quasi crime.

2d. To liberate the captain himself whenever having contracted only as such he has taken no personal obligation. But in case of fault, crime or quasi crime, the captain remains no less bound, notwithstanding the abandonment.

3d. To limit the creditors to the power to obtain payment from the thing abandoned. This result is absolute and general. So that the abandonment completed to the creditor puts the shipowner beyond the reach of all proceedings on the part of those who might make further claims. There only exists for them an action in some sort, *in rem*, and they are not able to exercise their rights except upon the abandoned ship or her price, if sold. Ibid. 360.

ARTICLE 191, § 10 CODE DE COMMERCE.

"The amount of premiums of insurance effected on hull, keel, rigging and apparel, and upon the outfit and equipment of the ship, due for the last voyage."—(Bédarride, vol. 1, p. 66.)

§ 127.—One might be tempted to address another (reproach) to article 191 that it relegated to the 10th rank the lien of the insurers who preserved the insurance in default of the thing. But in fact that preservation offers no advantage to the body of lienholders. We shall see, in effect, in a following article, that the liens, whatever they may be, are extinguished by the loss of the thing, and never reach the amount of the insurance. That body,

grévée d'un droit qui ne lui profitera dans aucun cas.

140.—Mais en général les navires sont assurés, et, en cas de sinistre, l'assureur doit tenir compte de la valeur qui leur a été assignée. Le montant de l'assurance se substitue donc à la chose. Les priviléges grevant celle-ci pourront-ils être exercés sur ce prix ?

Nous avons déjà cité an arrêt de la Cour de Bordeaux, du 28 janvier 1839, qui consacre l'affirmative.[2] Mais cet arrêt se contente d'admettre, sans le discuter, le principe de la substitution du montant de l'asssurance au navire. Il faut donc chercher ailleurs les motifs de cette opinion. Nous allons les trouver dans la doctrine que Valin enseignait sous l'empire de l'ordonnance.

Ce célèbre jurisconsulte commence par rappeler un arrêt du Parlement de Bordeaux, du 7 septembre 1758, qui repousse cette substitution, par le motif qu'elle n'est autorisée par aucune loi. Il répond :

"Il est vrai qu'il n'en existe point pour ce cas précisément. Mais, dès que le privilége des fournisseurs est formellement établi par les articles 16 et 17 du titre XIV ci-après, quoi de plus naturel que de le transférer sur le produit de l'assurance du navire affecté à ce privilége, puisque, au fond, ce sont les choses qu'ils ont fournies et les ouvrages qu'ils ont faits au navire qui ont fait la matière de l'assurance jusqu'à concurrence de la valeur qui leur était due ?

"Dans la réalité, le navire est représenté par le produit de l'assurance que l'assureur doit payer. Si le navire n'eût pas été mis en état de navigation, il n'aurait pas été assuré. Les fournisseurs et les ouvriers seront donc fondés à dire que c'est leur chose qui a été assurée lorsque le débiteur a fait assurer le navire.[1]"

[2] *Supra* no. 129

[1] Liv. 1er, tit. 12, art. 8

then, could not be encumbered with a right which could profit them in no case. (160 Bédarride, vol. 1, du Commerce Maritime.)

§ 140.—But usually ships are insured, and in case of loss the underwriter should account for the value assigned to him. The amount of the insurance takes the place then of the thing. The liens burdening this, can they operate upon that sum? We have already cited a decision of the court of Bordeaux of January 28, 1839, which establishes the affirmative, but that decision admits without discussion the substitution of the insurance for the ship. We must seek elsewhere the motives for that opinion. We find them in the doctrine which Valin taught under the influence of the ordinance. Ibid. 177.

That celebrated *juris consult* begins by recalling a decision of the Parliament of Bordeaux, September 7, 1758, which rejects this substitution for the reason that it is not authorized by any law.

He responds: "It is true that none does exist on that precise point. But since the lien of supply men is formally established by articles 16 and 17 of title 14, hereafter what more natural than to transfer it to the product of the insurance of the ship affected by that lien, since, to go to the bottom, the articles which they have furnished and the work which they have done to the ship have created the subject of insurance up to a concurrence in value with the amount due them. In reality, the ship is represented by the insurance, which the insurer is bound to pay. If the ship had not been put into a state for navigation it would not have been insured. The supply men and laborers will have ground to say, that it is their property which has been insured, when their debtor has insured the ship."

L'aveu fait par Valin, qu'aucune loi n'autorise la substitution pour laquelle il se prononce, enlève à son opinion tout caractère juridique. En effet, Valin n'enseigne-t-il pas lui-même que la matière des privilèges est de droit étroit ; qu'il n'est pas permis de raisonner par analogie. Il suffirait donc du silence gardé par la loi, pour exclure toute idée de privilége sur le montant de l'assurance.

Sans doute le prix est l'équivalent de la chose, il la représente même complèment en cas de vente, mais pourquoi ? Parce que la chose n'a pas cessé d'exister ; que les créanciers la suivent dans les mains mêmes de l'acheteur, ils peuvent l'y saisir, et leur privilége sur le prix n'est que la conséquence du privilége existant sur la chose, jusqu'après leur payement. La différence donc, dans l'hypothèse d'une vente et dans celle que nous examinons, est capitale. Dans l'une, la chose existe. Elle a péri dans l'autre. Comment le résultat serait-il le même ?

Ce qui se réalise d'ailleurs dans le cas d'un immeuble, peut-il se produire dans l'hypothèse d'un objet particulier ? Non, dit Émérigon. Dans ce cas, le prix ne succède pas à la chose : *In particularibus pretium non succedit in loco rei.* Les auteurs nombreux qui l'ont ainsi admis, de Luca, Fabert, Dupérier, se fondent sur divers textes de droit. Il suit de ce principe que si l'acheteur à qui on a fait crédit a revendu aussi à crédit la marchandise achetée et qu'elle ait cessé d'être extante et en nature, le vendeur primitif n'a aucun privilége sur le prix dû par le second acheteur, quoique ce prix procède de la chose qui lui avait été propre et dont il n'a pas été payé. Telle était la jurisprudence constante du parlement d'Aix. A plus forte raison, les fournisseurs et les ouvriers n'ont point de privileges sur les assurances d'un navire qui ne leur a jamais appartenu, "Car, comme dit Cujas sur la loi 6, Dig. §3, *Comm. divid.*, il n'y a rien d'essentiellement commun entre le droit de gage et le droit de propriété : *Nihil commune habet pignus, cum dominio.*"

The admission by Valin that no law authorizes the substitution for which he declares, takes from his opinion all judicial character. In effect, does not Valin himself teach that the matter of liens is of strict law, that it is not permitted to reason from analogy? The guarded silence of the law should suffice then to exclude all idea of lien upon insurance.

Without doubt the price is the equivalent of the thing; it even represents it completely in case of sale. But why? Because the thing has not ceased to exist; the creditors follow it into the very hands of the buyer; they can seize it there and their lien on the price is only the consequence of the lien existing on the thing until their payment. The difference, therefore, between the hypothesis of a sale and what we are examining is capital. In one case the thing exists. It has perished in the other. How could the result be the same?

That which happens otherwise in case of a fixture is it possible to bring about in the case of a chattel?

No, says Émérigon; "In that case the price does not succeed to the thing. *In particularibus pretium non succedit in loco rei.* Numerous authors who have admitted this—De Luca, Fabert, Dupérier—establish themselves upon divers texts of law. It follows from this principle, that if the buyer on credit has resold on credit the merchandise bought, and which has ceased to be extant, the original vendor has no lien on the price due by the second buyer, although that price proceed from the thing which has been his property, and for which he has not been paid. Such are the constant precedents of the parliament of Aix. For a much stronger reason, the material, men and workmen have no lien upon the insurance of a ship which has never belonged to them; for, as says Cujas, sur la loi, 6, Dig. §. 3, *Comm. divid.* 'There is nothing essentially in common between the right of pledge and the right of property. *Nihil commune habet pignus, cum dominio.*'"

On pourrait objecter qu'Émérigon raisonne en droit commun, mais l'application de ce droit à la matière commerciale n'est repoussée que lorsque la loi spéciale ou l'usage déroge à ses dispositions. Or, de l'aveu même de Valin, cette loi spéciale gardant le silence sur la matière, celle ci se trouve forcément sous l'empire des principes rappelés par Émérigon, dont voici la conclusion :

"En un mot, l'ordonnance de 1681 n'accorde aux ouvriers et fournisseurs le privilége *que sur le navire*, par conséquent ils n'en ont aucun sur les assurances. Si le navire était représenté par l'assurance, il faudrait que les priviléges sur les sommes assurés fussent accordés aux matelots et à tous les autres créanciers dont il est parlé dans l'article 16, titre de la saisie. Par ce moyen l'objet de l'assurance serait manqué.[1]

Cette dernière considération est décisive, et il est évident qu'on devrait décider en faveur de l'un ce qu'on admettrait dans l'intérêt de l'autre. La loi ne distingue les privilèges que par le rang qu'elle leur assigne, mais on ne pourrait, chacun venant à ce rang, leur contester l'identité d'effet. D'ailleurs, est-ce que les prêteurs ne pourront pas dire ce que Valin met dans la bouche des fournisseurs : Sans notre argent le navire n'étant pas en état de naviguer n'aurait pu être assuré. Lors donc que notre débiteur a contracté une assurance sur le navire, c'est notre chose qu'il a assuré.

Le systéme de Valin, indépendamment de ce qu'il n'a aucun fondement, conduirant donc à une inégalité choquante, si on le réduisait aux fournisseurs et ouvriers. Mais en l'étendant à tous les privilégiès, on méconnaît l'objet de l'assurance ; on rendrait inique le classement au dixième rang de la prime due pour cet objet. Elle aurait dû être placée immédiatement avant le privilége des gens de mer, si elle avait réellement pour but de conserver le gage commun.

[1] *Contrats à la grosse*, chat. 12, sect. 8.

They might object that Émérigon reasons according to the common law, but the application of that law to commercial matters is only rejected when a special law or usage withdraws it from its provisions. Now by Valin's own admission, the special law being silent on this matter, it is of necessity forced under the control of the principles recalled by Emerigon, the conclusion of which is as follows:

"In a word, the ordinance of 1681 accords to workmen and material men a lien only on the ship; consequently, they have none on the insurance. If the ship were represented by the insurance, it must be that liens should be accorded to the sailors and all other creditors spoken of in article 16 under the title of Seizure: by this means the object of insurance would be lost."

This last consideration is decisive, and it is evident there should be a decision in favor of one similar to that permitted in the interest of the other. The law does not distinguish liens except by the order assigned to them, but it is impossible, each coming in its order, to dispute the identity of the result. Besides, cannot the lender say what Valin puts in the mouth of the material men, without our money the ship, not being in a state for navigation, could not have been insured? Then when our debtor has effected insurance on the ship, it is our property which he has insured.

The system of Valin, independently of the fact that it has no foundation, would conduce to a shocking inequality if confined to the material men and laborers. But in extending to all the lienors, they misunderstand the object of insurance. They would make an unrighteous classification in the 10th rank of the premium due for that object. It should have been placed immediately before the lien of captain and crew, if its real object was to preserve a common pledge.

Aussi, est-ce l'opinion d'Émérigon qui a prévalu dans la doctrine moderne, consacreée notamment par un arrêt d'Aix, du 26 mai 1818.[1]

Une des conséquences que Valin déduisait de son système était la faculté pour les ouvriers et fournisseurs de sommer le propriétaire de déclarer s'il avait ou non fait assurer ; et, en cas de négative, de se faire autoriser à assurer pour son compte. Le rejet du système entraine celui de ses consèquences.

Les ouviers et fournisseurs peuvent aujourd'hui s'opposer au départ du navire, le faire saisir même pour être payé de ce qui leur est dû. S'ils n'ont pas usé de ce droit, s'ils ont laissé le navire abandonner le port sans réclamation, ils ont par cela même accepté les dispositions prises par l'armateur. L'assurance n'est qu'un acte de l'administration de sa propre chose, que nul, pas même les tribunaux, ne sauraient le contraindre à accomplir contre sa volunté.

[1] Boulay-Paty, t. 1, p. 13 ; Pardessus, No. 957 ; Delvincourt, t. 1, p. 186.

That also is the opinion of Émérigon, which has prevailed as a modern doctrine, perpetuated notably by a judgment at Aix, May 26, 1818.

One of the consequences which Valin deduced from his system was a power in the workmen and material men to summon the shipowner to declare whether or not he had insured, and in case of a negative to authorize them to insure for his account. The rejection of the system drew on the rejection of its consequences. The workmen and material men to-day can prevent the departure of the ship, can seize her to be paid what is their due. If they have not used this right, if they have let the ship go without claiming it, they have by so doing accepted the disposition made by the owner. Insurance is only an act of administration by him of his own property which nobody, not even the Courts, should be able to compel him to do against his will.

118-507

SUPREME COURT OF THE UNITED STATES.

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| JOSEPH W. DYER ET AL.<br>AGAINST<br>THE NATIONAL STEAM NAVIGATION COMPANY. | No. 1159. |

It is hereby stipulated that this cause may be advanced on the calendar under subdivision 4 of Rule 26 as a case once adjudicated by this Court upon the merits, and again brought up by appeal, and that this case be set down for argument on Wednesday the 10th of December, 1884.

Dated New York, November, 1884.

(Signed) JOHN CHETWOOD,
Proctor Respondent.

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SUPREME COURT OF THE UNITED STATES.

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| JOSEPH W. DYER ET AL.<br>AGAINST<br>THE NATIONAL STEAM NAVIGATION COMPANY. | No. 1159. |

And now comes the libellant and moves this Court that this case, once heard on its merits, may, pursuant to the annexed stipulation and in accordance with the rules of this Court, be advanced on the calendar and set down for argument on Wednesday the 10th day of December, 1884.

Dated New York, November 15, 1884.

JAMES C. CARTER,
Attorney for Libellant and Appellant.

Office Supreme Court U. S.
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JAMES H. McKENNEY.
CLERK.

# SUPREME COURT OF THE UNITED STATES.

THE NATIONAL STEAM NAVIGATION COMPANY

*vs.*

JOSEPH W. DYER ET AL.

## BRIEF SUBMITTED BY LEAVE OF COURT, ON BEHALF OF JENS THOMMESSEN ET AL.

JAS. K. HILL, WING & SHOUDY,
*Proctors for* J. THOMMESSEN *et al.*

HARRINGTON PUTNAM,
*Advocate.*

# SUPREME COURT OF THE UNITED STATES.

THE NATIONAL STEAM NAVIGATION COMPANY

*vs.*

JOSEPH W. DYER *et al.*

Brief submitted by leave of Court by counsel for Jens Thommessen and Julius Smith, of Arendal, Norway, libellants, in an action in the Circuit Court, of Thommessen *v.* Whitwill (reported 12 Fed. Rep., 891), upon the question of taking proof of the insurance effected on the injuring vessel, in proceedings to limit the liability of its owners for consequences of collision at sea.

These libellants, in submitting this brief, desire to suggest to the Court, that in the aforesaid action, in which they are parties, various distinguishing facts have superadded other questions to the general proposition now under consideration. That the insuring of all interests that should appertain, the peculiar risk assumed, the vesting of libellants' right anterior to the final casualty, the abandonment to underwriters, and the subsequent legal proceedings, together constitute equities in their behalf which, perhaps, are superior to those now disclosed by the petitioners in the case at bar.

The question of subjecting an insurance upon individual interests to the supposed claims of third persons, is often disposed of by saying that a purely personal indemnity enures to the sole benefit of the party contracting for it. If the equities are on the side of the insured, this is clear, beyond discussion. Ordinarily, therefore, a defendant who is a wrongdoer, cannot defeat or reduce the plaintiff's claim, because the injured party has obtained full indemnity by means of insurance.

Where the shipowner invokes the favor of the law to liberate him from a just burden of payment of damages, for the acts inflicted by his vessel, under control delegated to servants of his selection, the equities preponderate in favor of the injured party. The exoneration sought is of grace, and not of right. The decisive fact that the law has shut off the remedy save against the owner's interest in the *res* insured, would seem to strengthen the equities of the claimant of damages.

The statement of the question depends on the terms of the statute limiting liability. With the foreign statutes, which speak only of vessel and freight as a material object, the inquiry is whether this *res* can, for any purpose, be deemed to have survived its physical destruction in the form of insurance money paid to the owner. Under a statute which expressly correlates the owner's liability to his proprietary interest, the point is whether that interest is entire and indivisible. Does the law intend a transfer or valuation of the proprietary interest in vessel and freight which shall allow the defending owner at the same time to reserve that interest undiminished for the purpose of collecting and holding insurance?

Whatever be the relative priority of the creditors and claimants upon the vessel, little is hazarded in asserting that the equity of the claimant of damages for collision is superior to any demand upon the vessel antecedently acquired. Conditions fully securing the creditor may be imposed, when money, labor or supplies are voluntarily advanced to the vessel. The doctrine of the maritime community of vessel and cargo also operates to subordinate the claims of the latter, in event of collision occurring after the cargo is laden on board. Instances of the recognition of any class of ship-creditor's claims as equitably entitled to the shipowner's insurance are, therefore, strictly in point upon the question of damages by collision, and, it is confidently maintained, admit of the *a fortiori* argument when adduced in the present petitioner's behalf.

A somewhat discursive citation of authorities will be therefore permissible, in view of the novelty of the question in this Court, and the wide range of argument accorded to the subject in foreign tribunals.

## I—French Authorities.

M. Auguste Laurin, in a note to his edition of the posthumous work of M. Cresp (*Cours de Droit Maritime*, Paris, 1876–1878), discusses incidentally the question whether a lien (*privilége*) or hypothecation can be exercised upon the insurance money received by the debtor after destruction of the *res*. Having referred to the maxims applicable according to the civil law, he continues, vol. 1, p. 182:

"The question which our subject concerns had in times past divided Valin and Emerigon. The former conceded without difficulty that the *privilége* should be transferred from the *res* to the indemnity of insurance, which, according to him, was a natural and necessary representation [*la représentation naturelle et forcée*] (Valin sur l'art. 3, titre XII, liv. I de l' Ord, t. I, p. 316). Emerigon argued the contrary from the absence of a formal statute, and the aforesaid rule, *nemo in re particulari*. (Emerigon, *Contrats à la grosse*, chap. XII, sect. 7, t. II p. 585 et seq.)"

We are referred, therefore, for the starting point of this question to the two famous commentators whose divergencies of opinion are the source of so many controversies in maritime law.

The above cited text of Valin, (1695–1765)is from his *Nouveau Commentaire sur l'ordonnance de la Marine*, published in 1760. The inquiry considered by him was whether, in case of the loss of a ship insured, the material men who held liens against her were entitled to the same lien on the insurance. After saying that the material men may make claim against the owner, reserving their privilege upon the ship, Valin proceeds as follows, Vol. I., p. 316:

"Moreover, when the solvency of the shipowner becomes doubtful, they demand that he should declare whether he has had the ship insured and to what amount, and that he shall deposit the policy of insurance with the Clerk of the Admiralty, to the effect that in case of loss of the ship they may hold the privilege of their debts upon the insurance recovered."

Again:

"If the owner has really procured insurance, I have no doubt at all that in case of loss of the ship these same privileged creditors have the right to hold their privilege on the product of the insurance."

And again, he refers to a contrary decision by Parliament of Bordeaux, Sept. 7, 1758, where he says:

"This privilege which I give by the law to material men and workmen, by transmission or subrogation, upon the product of the insurance, was rejected, on the principle that there is no law which authorizes this transfer of privilege, and that every privilege must be founded on some law.

"It is true that there is none for this precise case, but since the rights of material men and workmen are formally laid down by Articles 16 and 17 of Title 14 (*infra*), what is more natural than to transfer these rights over to the insurance moneys on the vessel to which these rights attach, since in fact it is the things furnished by the material men and the work performed upon the vessel which form the subject matter of the insurance, at least to the extent of their claims against the vessel? In reality, the vessel is represented by the insurance money which the insurer has to pay. If the vessel had not been put into seaworthy condition, it would not have been assured; material men and workmen, therefore, have a right to say that it is their property which was insured, when their debtor has insured the vessel. And in the same way that no specific statute is necessary to transfer the lien of the vendor of timber to the staves into which it has been made, or of the vendor of wine to the distilled liquor manufactured therefrom, and so on; so, it does not need any express law to transfer the lien of material men and workmen to the insurance money on the vessel.

"Moreover, the interests of trade are intimately connected with this question, inasmuch as the cutting off of this lien would cause material men and workmen to give no more credit to shipowners and ship-chandlers. Now, if this were the custom, how often would the fitting out of vessels fall through?

"Further, what injury can the transfer of this lien work? And, on the other hand, where would be the justice of taking away from them the right to a lien on the insurance, so that the other creditors of the bankrupt shipowner may profit by it, or the shipowner himself, in case he has arranged with his other creditors?

* * * * * * * *

"This decision is still more noticeable, inasmuch as it comes from the Parliament of Bordeaux, where it is a maxim that the price of a thing stands for the thing itself to such an extent that the vendor of personal property preserves his lien on the purchase money which is found to be still due by a second buyer. (Lapeyrere, Letter P., No. 129; see also Notes.)

"The application is so natural of this case to that of the insurance of a vessel to which the liens of supply men, material men and workmen attach, that it is not perceived in what the reason of a difference lies; for, in fact, the insurance money represents the vessel as exactly as the purchase money of a thing represents that thing. It is true that this ruling of the Parliament of Bordeaux is not generally followed throughout the country; but equity none the less demands that the lien of material men and workmen should be transferred to the insurance money recovered on the vessel, since it is really their property which has been insured, through the insurance of the vessel, its tackle, apparel and furniture.

"This at the same time concurs with the argument drawn from the rule that personal property cannot be followed when it is out of the possession of the debtor; for if it be true that the insurance money represents the vessel, it is also true to say that the vessel is still in the possession of the debtor, as the result of this subrogation.

"For the same reason it cannot be made an excuse (*moyen*) that the vessel has been wrecked or captured by enemies, since the insurance money brings back matters to the same condition as if the vessel had arrived safely.

"I will acknowledge, however, that arguing *de apicibus juris*, the position of material men and workmen presents some difficulty; but certainly equity is with them, as well as the best interests of maritime commerce."

Emerigon (1714–1785), writing in 1784, dissented from this opinion of Valin. His chief ground of objection (aside from the maxim already cited) was as follows:

"If the ship were represented by the policy, it would be necessary that a privilege on the policy should be given to the seamen and to every other creditor mentioned in Art. 16. By this means the purpose of insurance would be destroyed. If the effects lost were represented by the sum insured, the insurance would be represented by a reassurance, but we have seen that the first insured has no direct action nor privilege on the reinsurance. Thus the transfer or subrogation of which M. Valin speaks is not admissible." *Contrats à la Grosse*, Ch. 12, sect. 7, § 2, Hall's Translation, Baltimore, 1811, pp. 255, 256.

This controversy, dividing the French jurists, M. Laurin tells us in the note cited, continued after the Code of Commerce went into operation, which, containing no express enactment on this subject, left the matter open for the application of general equitable principles.

Pardessus (1772-1853), in his *Cours de Droit Commercial*, published in 1813–1817, was in favor of including the insurance in the *abandon* required to discharge the shipowner by Art. 216 of the French Code of Commerce. The precise language used by him in the first edition of that work is not now accessible, but the second edition (Paris, 1821,) is believed to have been unchanged on this point. In this edition Pardessus contented himself with a statement of the principle in almost the exact words of the Prussian law. At n. 663 he said:

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| Si ces choses avoient été assurées il devroit abandonner aussi ses droits contre les assureus. | If the thing had been insured, he should have also abandoned his rights against the insurers. |

In later editions he departed from his usual mode of concise statement, and amplified his views, and assigned his reasons as follows—Part IV., title 11, ch. III., § 2:

"L'armateur devant délaisser le fret, nous pensons que s'il l'avait touché en tout ou en partie, par avance, il devrait en rapporter le montant: et s'il était chargeur de quelques marchandises, il en devrait compter le fret à dire d'experts. Nous sommes même porté à croire que si le navire était assuré, les créanciers à qui l'abandon est fait auraient le droit d'exiger le montant de l'assurance, par le même motif qui nous a fait dire, n. 271, que l'acquéreur d'une chose assurée avait droit au prix dû par l'assureur, en cas de perte; en effet l'abandon est une translation de propriété, une dation en payement."

The owner having to abandon the freight, we think that if he has received it in whole or in part, in advance, he ought to return the amount, and if he has loaded some of the cargo he ought to account for the freight according to the opinion of experts. We are also brought to believe that if the ship was insured, the creditors, to whom the *abandon* is made, will be entitled to exact the amount of the insurance for the same reason which we have stated at sect. 271, that the acquirer of a thing insured has a right to the price due from the insurer in case of loss; in effect the abandon is a transfer of the property, a giving in payment.

In the prior chapter, No. 271, above referred to for the grounds of his position, the author having alluded to buyer's right to use the name or signs of the vendor, adds: Part. III., title 1, ch. 1, § 4:

Il y a beaucoup moins de doutes pour décider que si l'on vend un objet assuré, l'acheteur jouit des effets de l'asurance, parce qu'il serait contraire à la nature de ce contrat, que l'un eût les risques et l'autre profitât de la réparation de ces risques, parce que d'ailleurs, le vendeur qui se serait réservé le prix d'assurance, en cas de perte, se trouverait être assuré pour des choses dont il n'est plus propriétaire. Mais ce principe, incontestable dans les rapports entre le vendeur et acheteur, peut être considéré sous un autre point de vue, dans les rapports entre l'assureur et celui qui achéte la chose assurée. Nous l'examinerons dans le titre ix de cette partie.

There is much less doubt in deciding that if a sale is made of an article insured, the purchaser shall enjoy the proceeds of the insurance, for it would be inconsistent with the nature of the contract, that one should bear the risks, and another profit by the reparation for those risks; for otherwise the vendor who should reserve the insurance in case of loss, would be found to be insured for property of which he is no longer owner. But this principle, incontestable in the relations between buyer and seller, may be considered in a different point of view, in the relations between the insurer and the buyer of the thing insured, which we shall examine under title ix. of this part.

Boulay-Paty (1763-1830) in his *Cours de Droit Commercial* issued in 1822, held a contrary view, following Emerigon, whose *Contrats à la Grosse* he edited in 1827.

As Boulay-Paty has been extensively quoted in this country upon this and cognate questions, it may not be amiss to state that no edition of above work seems to have appeared since 1834.

Although this precise question cannot be disposed of by the relative weight of the different writers who have divided upon its discussion, the eminence of Pardessus in this department of the law ought not to pass unremarked. His *Cours de Droit Commercial* has been honored with a German and Italian translation. It is said by a most competent authority to have contributed more than any other work to found the science of commercial law.*

Pardessus' opinion prevailed in the Courts.

In a historical summary of the subject, M. Labraque-Bordenave in his *Traité des Assurances en France et à l'étranger* (Paris, 1876) states that:

"Before the law of June 14, 1841, which sanctioned the absolute separation between the landed fortune (*fortune de terre*) and the sea venture (*fortune de mer*) of the owner, it had been decided that the indemnity of insurance should be comprised in the *abandon* of the ship and freight. The learned author, M. Pardessus, regarded that *abandon* as a natural consequence of art. 216, Code of Commerce, and his opinion was adopted by several courts of the realm."

In the Royal Court at Bordeaux, early in the year 1839, the doctrine of insurance as a representative of the ship was declared. The facts and circumstances of this case are abstracted by Dufour, whose statement of the opinion appears (*infra*). The decision is noticeable as rendered in the same place as the contrary *arrêt* of eighty years before, which was animadverted upon by Valin (*supra*).

The change of the law in 1841 was wholly in the direction of extending further privileges to the shipowner. For seven years

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*M. de Valroger wrote in 1857 in Revue Critique de Législation of this treatise of Pardessus:—(Vol. 10, p. 474.)

"Le Cours de Droit Commercial obtint un immense succès attesté par cinq éditions. * * Nul livre n' a autant contribué à fonder la science du droit commercial. Il a paru depuis d'autres ouvrages dont je ne veux pas rabaisser le mérite, mais personne ne me démentira si je dis qu'aucun n'est parvenu à remplacer le cours de M. Pardessus et à le faire oublier."

See also F. von Holtzendorff *Rechtslexikon, art. Pardessus.*

prior thereto, his power of *abandon* had been restricted to illicit acts of the master, by decisions of the Court of Cassation. The amendment allowed the *abandon* for all and any acts. In connection with this amendment a motion to include the insurance on the subject matter of an *abandon* was voted down. As thereby a legislative preference was indicated against the opinions of Valin and Pardessus, it is important to note the reasons and considerations that induced the change which for the time being enabled the owner to retain his insurance free from adverse claims.

In a pamphlet entitled *Effets de l'Abandon du Navire*, by Raphael Gonse, Paris, 1872, the writer says the innovation in 1841 was opposed by a large party, who averred that it impaired the obligation of contracts.

"The opponents of the law invoked, besides, the example of foreign legislation. In the nations whose commercial prosperity had arrived at the greatest height, the principle of unlimited responsibility is adopted, at least as to engagements consented to by the master. It is in that sense that articles 621 and 622 of the Spanish Code were conceived. In the United States and in England the existing usages conform to that principle. * * * To these considerations, it was replied that a certain protection was necessary to the more timid and less adventurous character of our [the French] merchants; that each nation had special tendencies and a particular genius, which prudent legislators should take account of. * * * In the guiding thought in the preparation of the law of 1841, and the better to assure that protection which was thought necessary for maritime enterprises, they went so far as to decide that the amount of insurance should remain no less receivable by the owner who should have made an abandonment. Many of the Courts of Appeal had insisted on a contrary disposition, and M. Persil offered an amendment in that same view. But that amendment was lost. The purpose of the law, it was said, is to prevent the landed fortune (*fortune de terre*) of the owner from being hereafter compromised against his will by the hazards of navigation. If the loss of the insurance should be a necessary consequence of the abandonment of a ship, that which the owner would not lose, because of limitation of his responsibility, he will lose through the representation of his ship." pp. 9 and 10.

The law, as modified, therefore, can not be regarded as determining the rule for other nations. Indeed, for France it looks very much like legislative empiricism, and that, too, of a very fortuitous and fluctuating kind. Besides Persil, who was himself an acknowledged authority—having been a minister of justice in 1834—we find the position taken by him had even weightier support.

In De Courcy's *Questions de Droit Maritime, deuxième série* [Paris, 1879] it is stated, p. 195:

Lors de la vive discussion qui eût lieu en 1841, à la chambre des pairs, sur la modification de l'article 216, les magistrats de la cour de Cassation, qui s'opposaient ardemment à l'extension de la faculté d'abandon, demandèrent subsidiairement qu' au moins l'abandon comprît le produit des assurances.

At the time of the active discussion which occurred in 1841 in the Chamber of Peers concerning the modification of article 216, the magistrates of the Court of Cassation, who ardently opposed the extension of the power of *abandon* demanded in the next place that at least, the *abandon* should comprise the product of the insurance.

This statement is fully borne out by the original record of the discussion.

In 1841 Count Portalis (1778–1858), was president of the Court of Cassation. He was perhaps, one of the most distinguished jurists ever elevated to that office. At this time he had been a member of that Court sixteen years, being then sixty-three years of age. To understand his position in the debate, it is to be noted that the commission, in proposing the law, expressly introduced the question of insurance. Although the statute purported only to extend the shipowner's privilege of *abandon* to all acts of the master, the commission announced their intent to exclude the insurance. In this they would go counter to the most influential maritime court of appeals in France—the royal court at Aix, where cases arising at Marseilles are heard on appeal.

On presenting to the Chamber of Peers the report of the commission, M. Camille Périer said:

Nous devons examiner une question qui n'a pas été discutée dans l'exposé des motifs, mais qui a de la gravité, puisque plusieurs des cours royales qui ont émis un avis favorable à la disposition fondamentale de la loi, notamment la cour royale d' Aix, ont demandé, qu'elle fût résolue dans un sens différent de celui qui découlera de son texte. Dans le cas d'abandon du navire, l'armateur sera-t-il tenu d'abandonner aussi le bénéfice de l'assurance dont il aurait été l'objet ?

La commission s'est prononcée pour la négative.

(*Le Moniteur Universel*, Mch. 22d, 1841.)

We must examine a question which has not been discussed in the statement of the objects (of the law), but which is of weight, since several of the royal courts which have expressed an opinion favorable to the fundamental provision of the law, particularly the royal court of Aix, have demanded that it be settled in a different sense from that which will result from its text. In case of the *abandon* of the ship, will the owner be obliged to abandon also the benefit of the insurance, of which it has been the subject?

The commission has declared itself in favor of the negative.

In the discussion in the Chamber of Peers which followed the presentation of the report, Count Portalis, the president of the Court of Cassation, defended the old law against the charge of immorality, and alluded to the policy of protecting the shipowner to the creditor's prejudice as follows :

* * * Si l'on peut parler d'immoralité dans cette question, c'est la nouvelle disposition qui pourrait être considerée comme immorale * * * il faut que l'armateur ait intérêt à bien choisir son capitaine, à prendre les moyens qui lui assurent que les marchandises chargées arriveront en temps opportun à leur destination ; et pour cella il est moral qu'il ait un risque à courir si le contraire arrive. * * * Ce qui est moral, c'est que celui qui veut gagner puisse perdre quelque fois, et non qu'il s'exonère de toutes les chances contraires.

(*Le Moniteur*, April 18, 1841.)

If we may speak of immorality in this question, it is the new provision which may be considered immoral. * * * The owner ought to have an interest in choosing his master properly, in taking the means which insure the arrival of the cargo at its destination in good season, and for this it is right (*moral*) that he should have a risk to run in case the contrary happens. * * * Morality requires that he who wishes to gain may lose sometimes, and not exonerate himself from all adverse chances.

Referring to the courts, Portalis said :

Le rapport nous dit que plusieurs d'entre elles et entre autres la cour royale d'Aix qui la première a levé l'étendard contre le code de commerce, veulent bien qu'on accorde à l'armateur la faculté de se libérer en abandonnant le navire et le fret, mais à la condition qu'il abandonnera aussi les assurances. Vous voyez, messieurs, elles adoptent le projet de loi ; mais elles désertent le principle et répudient les conséquences.

The report tells us that several of the Courts, among others the royal Court of Aix, which first raised the standard against the code of commerce, desire that the shipowner be allowed the privilege of freeing himself by abandoning the ship and freight, on condition, however, that he shall abandon the insurance also. You see, gentlemen, they adopt the project of the law, but they forsake the principle and repudiate the consequences.

In the course of the same discussion Count Marburg said :

Le projet de loi ne parle pas de l'assurance qui pourra garantir au propriétaire de navire la valeur de son bâtiment, et le rapport de la commission énonce qu'il ne sera pas tenu d'en faire l'abandon.

Que resultera-t-il de la loi aussi expliquée par le rapport ? Que

The proposed law does not speak of insurance, which may guarantee the ship-owner for the value of his vessel, and the report of the commission declares that he will not be obliged to make an abandonment of it.

What will be the result of the law

l'armateur ayant envoyé en mer peut-être un mauvais navire et l'ayant fait assurer pour une somme qui en surpassera la valeur, n'aura pas un grand intérêt à le conserver, et que si le capitaine à qui il l'aura confié fait un emprunt ou fait vendre des marchandises pour des dépenses considérables, le propriétaire abandonnera le navire, prendra les assurances et laissera les créanciers sans payement. * * * *

Messieurs, peut-on admettre et la loi peut-elle vouloir que ce soit là le résultat des opérations qui ont été faites, d'un côté par l'armateur, de l'autre par ses chargeurs ?

Qu'a fait l'armateur ? Il a fait une spéculation dans laquelle il a pris l'obligation d'entretenir son navire en bon état, afin qu'il pût transporter à leur destination des marchandises qui lui ont été confiées.

Voilá son engagement ; il s'est muni d'une assurance qui couvre la valeur de son navire et du fret. * * *

Eh bien, avec de telles assurances qu'il élèvera le plus haut possible, précisément parce que son navire étant mauvais, il pourra craindre d'advantage de grandes avaries et des dépenses considerables; avec de telles assurances, dis-je, si son capitaine fait des emprunts, ou s'il vend des marchandises, et si le bâtiment fait naufrage ou arrive dans le porte assez détérioré pour n'avoir presque plus aucune valeur, l'armateur déclarera qu'il en fait l'abandon, et cependant il n'éprouvera aucune perte, parce que les assureurs lui payeront, non seulement le prix du navire, mas encore le fret qu'il aura su comprendre dans son contrat. * * * Vous changez complétement la position de l'armateur, vous la rendez meilleure, et vous changez la position du chargeur pour la rendre pire.

as thus explained by the report ? The owner having perhaps sent an unseaworthy ship to sea and having insured it for a larger sum than it is actually worth, will not have a great interest in its preservation, and, in case the master to whom he has entrusted it, effects a loan or makes a sale of the cargo for a considerable sum, the owner will abandon the ship, take the insurance and leave the creditors unpaid. * * * *

Gentlemen, can we admit, and can the law mean, that this shall be the result of the operations made, on the one side by the owner, on the other by the shippers ?

What has the owner done ? He has made a speculation in which he has assumed the obligation to keep his ship in good condition in order that he may transport to their destination the goods entrusted to him.

This is his engagement. He has protected himself by an insurance which covers the value of his ship and the freight. * * *

Well, with such an insurance, which he will raise as high as possible, just because his ship being bad, he may fear greater averages and considerable expenses—with such an insurance, I say, if the master negotiates loans, or sells the cargo, and if the vessel is wrecked or arrives in port so much injured as no longer to have any value scarcely, the owner will declare that he has made an *abandon* of it, and, nevertheless, he will suffer no loss, because the insurers will pay him not only the price of the ship, but also the freight, which he will have been able to include in his contract. * * * You change the position of the owner completely, you make it better ; and you change the position of the shipper to make it worse. * * * I

* * * Je pense donc que la disposition qui affranchérait l'armateur de toute responsabilité serait insoutenable si on n'ajoutait pas au moins que, dans le cas où il abandonnerait le navire et le fret, il serait obligé d'abandonner aussi le montant des assurances qui en représente la valeur.

(*Le Moniteur*, April 18, 1841.)

think, therefore, the provision which would free the owner from all liability would be unsustainable if it were not at least added that in case he should abandon the ship and the freight, he would be obliged to abandon the amount of the insurance also, which represents its value.

Persil, in closing the debate, said :

Ainsi, voila l'armateur dont le capitaine a emprunté qui sera libéré, à l'égard du prêteur comme à l'égard du chargeur dont la marchandise a été vendue, par l'abandon du navire, quoiqu'il garde le montant de l'assurance qui cependant est la représentation du navire. Le prêteur perdra son capital, le chargeur l'integralité de sa marchandise, et l'armateur bénéficiera de l'assurance. Je vous le demande, serait ce là de la justice. L'iniquité, là voici ; c'est que l'armateur dont le capitaine a fait un emprunt, ne payera ni ne perdra rien. * * * Il ne perdra rien, pas même le navire ; car l'assurance représente son navire. Vous ne supposerez pas qu'il l'ait assuré pour une somme au-dessous de sa valeur ; on pourrait admettre le contraire. Ce navire, il ne l'aura plus, à la verité, en planches, bois ou fer, il l'aura en argent que lui proposera la compagnie d'assurance. L'argument est produit : n'importe le moment où il est venu, il est de nature à faire un trés grande impression sur vos esprits, il consacre un principe révoltant que tout le monde peut apprécier, Il consiste en ceci que l'armateur qui, disait-on, en mettant son navire à la mer, voulait ne perdre que son navire, à l'aide de la loi ne pourra plus le perdre. Il peut se dispenser de payer les dettes contractées pour lui, mais rien ne lui,

Thus, the shipowner whose captain has obtained a loan, will be freed by the *abandon* of the ship, alike as regards the lender and the shipper, whose merchandise has been sold, though he keeps the amount of the insurance, which is nevertheless the representative of the ship. The lender will lose his capital, the shipper the whole of his merchandise, and the owners will get the benefit of the insurance. Would this be just, I ask ? The injustice lies here—the owner whose master has effected a loan will pay nothing, and will lose nothing. * * * He will lose nothing, not even the ship ; for the insurance represents his ship. You will not suppose that he has insured it for a sum below its value ; the contrary would be more likely. This ship, true, he will have no longer in planks, wood or iron ; he will have it in money, which the insurance company will tender to him.

The argument is produced ; no matter when—it is calculated to make a great impression upon your minds, it sanctions a revolting principle which everybody can appreciate. It consists in this, that the owner, who they say wished to lose nothing but his ship, if he sent it to sea, by the help of the law can no longer lose even that. He can get rid of paying debts contracted for him, but nothing will deprive him

mais rien ne lui enlèvera le navire, qui se retrouvera toujours et dans tous les cas dans l'assurance.

Eh bien, il ne paye pas ses dettes avec le montant de l'assurance ; il le garde. Entendez bien ceci, messieurs, cela est convenu par la commission et par M. le garde des sceaux. Par un artifice de mots on essaye de vous faire croire, que ce même armateur abandonne le navire. Eh bien, non, il ne l'abandonne pas, cela n'est pas vrai. S'il est obligé de de l'abandonner, il se rétourne vers l'assureur qui lui paye la valeur qu'il a lui-même donnée au navire. Je comprendrais la moralité de la loi, si cet argent servait á payer, soit les bailleurs de fonds, soit les chargeurs si on le leur abandonnait. Mais non l'armateur conserver son argent . . . . . L'immoralité, je vous le demande, n'est elle pas bien constatée.

* * *

En définitive l'armateur aura toujours son naviere ; s'il le perd il en sera indemnisé par les compagnies. Le navire ou l'argent voilá ses chances, pour les préteurs, pour les chargeurs ce sera autre chose ; ils pourront tout perdre quoiqu'ils n'aient jamais consenti à courir des chances, quoique dans aucune hypothése ils ne puissent être indemnisés de ces chances par aucune espérance de bénéfice. La lois si vous l'adoptez pourra faire la fortune de l'armateur mais à coup sûr elle fera la ruine des préteurs et des chargeurs ; elle éloignera les uns et les autres et nuira au commerce maritime que le projet avait pour but d'encourager ; prétexte et rien autre chose.

* * *

of his ship which will always, and in all cases, be found in the insurance.

Well, he does not pay his debts with the insurance money ; he keeps it. Keep this well in mind, gentlemen; it is acknowledged by the commission and by the keeper of the seal. By a word juggle they try to make you believe that this same owner abandons the ship. No, he does not abandon it. That is untrue. If he is obliged to abandon it, he turns to the insurer who pays him the value he has himself given the ship. I should understand the morality of the law, if this money served to pay either the lenders furnishing the capital or the shippers, if it were abandoned. But not for the owner to keep his money—is not the immorality perfectly plain, I ask ?

* * *

The fact is, the owner will always have his ship ; if he loses it, he will be indemnified by the companies. The ship or the money—these are his risks. As for the lenders, the shippers, it will be another matter ; they may lose everything, though they have never consented to run any risks, though on any hypothesis they cannot be indemnified for these risks by any hope of benefit. If you adopt the law, it may make the fortune of the shipowner, but it will certainly (*à coup sûr*) ruin the lenders and the shippers. It will drive away both, and injure the maritime commerce which the project was intended to encourage—a mere pretext, nothing else.

As a final appeal to include the insurance, Persil said :—

C'est le seul moyen d'empêcher que l'armateur s'enrichisse quand les prêteurs et les chargeurs se ruinent. *Le Moniteur*, April 18, 1841.

It is the only way to prevent the owner from getting rich, while the lenders and the shippers are being ruined.

The ultimate passage of the law, notwithstanding these considerations, was largely due to the point insisted upon by M. Dalloz in his final report to the chamber, which in substance was that the French were more timid in maritime enterprises, and required inducements beyond those of other countries to encourage capitalists to engage in shipping.

*Le Moniteur*, *May* 18, 1841.

See also discussion of this question by M. J. Bergson in *Revue* (*Foelix*) *étrangère et Française de Lég.*—Vol. 8, p. 540 (1841).

During a considerable interval after the passing of this law of 1841, the principle of disregard of creditors' claims in matters of insurance seems to have been generally acquiesced in. The two editions of Pardessus which appeared respectively in 1841 and 1856, repeated his earlier opinion. For the time they stood almost alone. In 1859, however, a re-examination of the whole matter was made in the *Droit Maritime* of Edmond Dufour, who was afterwards a member of the Commission of 1865 for revision of the Maritime Laws of France.

Dufour's investigation of the subject was complete and exhaustive, occupying over twenty-five pages of his treatise (pp. 372–398). He considers the question of the equity to insurance on different hypotheses, some of which are foreign to the facts now in hand. Space permits little more than a statement of his conclusions. Assuming the case of recovery of insurance where a vessel is wholly uninjured (that is, when it is abandoned to underwriters because unheard of for the required period, and afterwards arrives safely, but, by the abandonment has passed irrevocably to the underwriters) his conclusion is that the creditor's right against the insurance is complete and certain. From these and other supposed cases, he reasons out an equity to the shipowner's insurance where there is any *débris* remaining from the vessel, by arguments concluding as follows, p. 391:—

"Now in these different hypotheses, all of which may give rise to an abandonment (*délaissement*) it seems to me that the creditor's lien ought to attach to the insurance (*devoir s'exercer sur l'assurance*) according to the distinctions which I have set forth above for the preservation of the lien upon the vessel itself. In fact, I do not see that there is any difference between the case of a mere legal loss [*perte purement légale*] and that of an

actual loss (*perte réelle*) when the latter allows the lien to remain in force on the thing itself. In both cases, action on the part of the creditor against the abandoned ship ought to give a right to the insurer to resort to the amount of insurance. This allows us to say that this indemnity represents (as we know it does) the ship itself, and is subject to the same rights.

It is on one of these hypotheses that a judgment of the Court of Bordeaux seems to have been rendered, which is in support of the theory I have presented. In 1828 Foussat made an advance of 70,000 francs to Bureau, captain of the ship *Revanche*, for fitting out the vessel for a voyage in the Southern seas. The outward voyage made, in February, 1829, Capt. Bureau determining to return, writes to Foussat to insure his ship for the return voyage, and Foussat effects the insurance and pays the premium. The ship puts to sea and perishes. How, and under what circumstances, the statement of facts which I borrow from the report of M. Dalloz does not indicate, but we shall see, that the terms of the decree necessarily imply a mixed loss (*perte mixte*) resulting from becoming unnavigable (*innavigabilité*) through the fortune of the sea. The word *condamné* used by the reporter can have no other meaning. Whatever it was, Foussat got from the insurers 27,600 francs, the amount of insurance on the ship. Bureau having been decreed insolvent, his syndics demanded of Foussat an account of his dealings with the insolvent. In the account Foussat deducted specifically the amount of insurance on the vessel which he had received from the insurers. This deduction was disputed. But the court overruled the objection, saying:

'Whereas, Foussat Bros. have a *pvivilége* for the sums advanced by them for the expense of fitting out the ship *Revanche* as provided by subdivision 8 of Art. 191 of the Code of Commerce. Whereas, the ship having been condemned is represented by the insurance on it (*se trouve représenté par les assurances sur corps*) received by Foussat Fils et Cie.' *

§ 272. Yet in this hypothesis of an actual partial loss, the exercise of the *privilége* upon the amount of insurance may raise another difficulty which at first blush seems serious; but I think a moment's examination sufficient to cause it to disappear.

The simple contract creditors [*les créanciers chirographaires*] might be tempted to maintain: Since it is claimed that the lien on the insurance is connected with the lien on the vessel it must at least be concluded, that the creditors have no more right over the insurance than remains to them over the thing itself. Now, when the ship has suffered a real deterioration, the security of the lien creditors, although still in existence, has evidently been diminished. You say there is still a ship. As you will. It is no less true that the ship was worth 50,000 francs on leaving port and to-day is worth 15,000. So it is impossible to exercise your *privilége* on the 50,000 francs which made up the amount of the insurance. You can exercise it only to the amount of the actual value of the security, as you might have done if the ship had not been insured.

Still, I repeat this reasoning does not seem to me to be conclusive and I think it can be easily answered.

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*Reported Dalloz, 39, 2, 142.

And in the first place it is said, the security of the lien creditors is diminished. You are right if you mean to speak of the material object, but you would be greatly deceived if by this you should understand that the creditor's right to the *res* had become diminished by the deterioration it has undergone. For the right is now what it was before the deterioration. It is a truth which experience witnesses to every day, and one which no one will dare to gainsay. Thus, my debtor having given me a hypothecation on his house, the property comes to deteriorate, and to be diminished in value. No matter; my right is not affected. Undoubtedly the results will be less profitable, when the right comes to be enforced, but in itself it is not changed. Therefore, if I find an easy-going purchaser, or a blind one, who buys the property for more than it is really worth, my hypothecation will give me a profit from this advantageous opportunity. The reason is, that my right attaches to the *res*, not to its value; whence it follows that it is the same so long as the *res* exists, and thus it is unaffected by the changes in value it may suffer.

It is the same in this case. The ship has undergone a material deterioration, and its value is much diminished. But since it survives this disaster, the right of the creditor, as far as the principle goes, remains exactly what it was before. So much so, that should the vessel come to be sold for more than it is worth, no one would dream of saying to the creditor: You shall limit your privilege to the actual value of the security, and shall not profit by the good fortune which has been met with in selling very high.

These ideas are elementary, and I ought almost to ask pardon for setting them forth. On reflection, however, we shall see that they are sufficient to solve the question put. For in my hypothesis the owner of the ship does not sell the ship but abandons it. Now what is an abandonment (*délaissement*)? It is a transfer of the property in the ship to the insurer. 'Abandonment is equivalent to a transfer.' (*Le délais équipolle à un transport*) the *Guidon de la mer* well says. Nevertheless, this transfer of the ownership, which is of the essence of abandonment, is not so far as I know made out by a gratuitous title. It is done in consideration of a price (*moyennant un prix*), which in the case represents the *res* abandoned. Well, I demand that the creditors whose *privilége* extends to the whole *res* should have a privilege equally upon the whole price. This price, it is true, is higher than the actual value of the *res*, for it has been fixed according to its value before the disaster. But what does it matter? Whether it exceeds its value or not, it represents the *res*, and that is all that is necessary. In the same way that the creditor might exercise his *privilége* on the whole *res*, whatever its value, he may exercise it also on the whole sum which represents it, whatever the amount. So much the better for him, if his debtor, by making use of the combinations which insurance afforded him, has been able to get from his ship, when damaged, the same price he would have got from it, when in good condition.

On other accounts, it would be idle for creditors to wish to take advantage of the fact that this exceptional price, paid in consideration of abandonment, has been obtained by means of a premium which the insured has taken out of his own funds, and to conclude therefrom, that the capital applicable to simple contract creditors [*masse chirographaire*] which has furnished the premium ought also to profit by the insurance for all which is result of it; that is to say, for the part of indemnity which exceeds the

actual value of the vessel. The answer to them might be: The debtor was master of his own funds; he might, for instance, have devoted them to making considerable improvements on his ship, by which the creditors with a *privilége* would certainly have profited to the exclusion of all others. This is not what he has done; he has used his money not to increase the value of his vessel, but to keep it always the same whatever may happen in the future. Nevertheless, the *privilége* creditors will get the benefit of this precaution as they would have been benefited by the increase. Absolute over the ship, their right is absolute over the sum paid in exchange for the ownership of their security.

These are what seem to me to be the true principles in the matter. I think they are susceptible of limitation only so far as the freight is concerned. We know, in fact, that abandonment includes the freight carried by the cargo that is saved. The result is that the indemnity of insurance represents at once the ship and the freight which has been abandoned. Now as this freight is not in general appropriated to the *privilége* creditors it is certain that they have no right to reach the portion of insurance money which represents the freight. They are therefore obliged to suffer the deduction of the abandoned freight.

§ 273. There is still another question which may be suggested by the exercise of the *privilége* in case of the partial loss of the vessel. I have said in the preceding pages that creditors having a lien on the vessel retain it on the *débris* when it still constitutes a ship. I added that upon the same conditions their *privilége* would pass to the indemnity of insurance if the disaster suffered was one of those which either by terms of agreement or by those of law involve an abandonment. Now it is unnecessary to say that both these liens cannot be simultaneously exercised. Necessarily we must choose between them. But you ask whether this choice is optional with the creditors, or, on the contrary, they can be, in spite of themselves, deprived of the insurance and compelled to satisfy themselves out of the wreck.

In support of the latter view it will be said: If it is true that the creditor's *privilége* can be enforced on the indemnity of insurance it is because it exists against the ship. Above all it is the vessel that is their security, and the insurance is answerable to them only because it represents the ship. Now, when they have in their hands the *res*, how can they be allowed to lay it aside in order to take up something else, which is but a fictitious image of the thing?

This reasoning seems to me to be wanting in justice. It would tend to establish that *privilége* creditors have only a kind of subsidiary right, whereas they have an immediate right. Abandonment may, as I said a moment ago, be assimilated to a sale from insured to insurer. The indemnity of insurance is the price paid. In these circumstances the creditors without any doubt preserve their right entire.

Now, who would venture to maintain that, in case of a sale, the creditor is bound to exercise his *privilége* against the ship without being able to resort to the price? No one, certainly; for even the right which he retains on the *res* makes the price its representative so far as it is concerned, and gives him the same lien on the price as on the *res*. This is the reason, I think, that the creditors, having a *privilége* on the vessel, have, on this supposition, the right to leave the *débris* on one side, and resort to the indem-

nity of insurance, just as they would be free to abandon the insurance, in order to proceed against the *débris*, if that be for their interest." *

M. Laurin, in the note already cited, seems to regard the foregoing reasoning as the better view. Having cited Boulay-Paty, and other authors, who concurred with Emerigon, he adds, p. 183:—

Dufour soutenait très-nettement le contraire, avec des distinctions cependant, t. I, Nos. 261 et sq. La jurisprudence elle-même dans les quelques cas où elle avait statué sur la question, s'était partagée. [citing cases.] Quoi qu'il en soit cette question n'existe plus aujourd'hui; la loi de 1874 l'a tranchée en accordant par son article 17 la subrogation; et bien que cette disposition ne statue qu'en vue des créanciers hypothécaires, il n'est pas douteux qu' elle ne doive par identité de motifs s'appliquer aux créanciers privilégiés.

Dufour upheld the contrary very clearly, with distinctions, however. Jurisprudence itself, in some cases where it had passed upon the question, was divided. Whatever it be, this question no longer exists to-day; the law of 1874 has solved it by allowing subrogation by the 17th article, and though this provision was enacted only for hypothecation creditors, there is no doubt, that by identity of reasons it must apply to privileged creditors.

The parity or identity of reason to which Laurin alludes, will appear from the fact, that by the French law the *privilége* is superior to other creditors, including those by hypothecation.

Thus the Code Civil provides, Art. 2095:

Le privilége est un droit que la qualite de la créance donne à un créancier d'être préféré aux autres créanciers, même hypothécaires.

The *privilége* is a right which the quality of the claim gives to a creditor to be preferred over other creditors, even those having hypothecations.

This statute of 1874 relates to hypothecation of vessels. Therefore Laurin argued that if the inferior encumbrance was admitted to the insurance, then it was clear that the paramount lien—the *privilége*—must be given the same equity. The article of this statute, relating to insurance, is as follows:

Art. 17. En cas de perte ou d'innavigabilité du navire, les droits des créanciers s'exercent sur les choses sauveés ou sur leur produit, alors même que les créances ne seraient pas encore échues. Ils s'exercent

In case the vessel be lost or be unnavigable, the rights of the creditors are exercised on the thing saved or its product, although the claims have not fallen due. They apply equally in the order of registration

* E.g. in case of insolvency of the underwriters.

également dans l'ordre des incriptions *sur le produit des assurances* qui auraient été faites par l'emprunteur sur le navire hypothéqué. Dans le cas prévu par le présent article, l'inscription de l'hypothèque vaut opposition au payement de l'indemnité d'assurance.

Sirey D. et C. Recueil Gén. an 1875 II., p. 627.

on the product of the insurance which the borrower may have effected on the ship hypothecated. In the case provided by the present article, the registration of the hypothecation avails as a bar to the payment of the indemnity of insurance.

The reason for this article is stated at length in the report of the Legislative Commission to the assembly by M. Grivart, an experienced maritime lawyer of Rennes, from which it appears that Art. 17 expressed the unanimous views of the commission.

In presenting it to the *Assemblée Nationale*, M. Grivart thought it necessary to anticipate a renewal of the objection, which, as has been seen, was started by Emerigon, viz: that if a lien creditor is paid from the insurance, then all unsecured creditors may equally share it. Grivart alludes to this as follows:

Les créanciers ordinaires seront, il est vrai, primés par les créanciers hypothécaires : mais l'indemnité d'assurance est en fait la représentation du navire, et si le navire n'avait pas péri, cette préférence eût existé.

Sirey D. et C. Rec. Gén. an 1875, 2, 631.

The ordinary creditors, it is true, will see hypothecation creditors put before them, but the indemnity of insurance is in fact the representation of the ship, and if the ship had not perished, this preference would have existed.

M. Laurin in discussing the obligation of a shipowner who makes an *abandon* to discharge his liability, finds himself again confronting this statute and the question of the inclusion of the insurance. Having cited the prior law permitting the owner to retain his insurance, he continues. Vol. I., p. 633 :—

"But this decision must to-day be combined with the important provision of Art. 17, of the law of December 10th, 1874, which, in case of loss of the ship through becoming unnavigable or otherwise, allows subrogation in favor of hypothecation creditors (*supra* 194). So that on final analysis the solution will introduce on this point the following distinctions: either the *abandon* will be made on the terms of a simple adjustment of averages, or else it will be made after *délaissement*. We shall see in a moment that the two things do not always exclude each other. In the first case Art. 17 of the law of 1874 will not apply, or it will fall under the pressure of old

principles, that is, the *abandon* will not extend to the indemnity of insurance.

In the second case there is a sub-distinction to be made: subrogation will take place in favor of hypothecation creditors, for whom there is an express decision of the law, and consequently in favor of lien creditors (there is here in fact an evident *a fortiori*); but it will not take place for simple contract creditors. whose situation has been modified in no way in this relation, and who, as far as they are concerned, remain completely and from every point of view subject to the old rule (except the indirect advantage which may result to them from the application of the new law in case of concourse with the lien or hypothecation creditors).

It cannot be denied that such a solution lacks homogeneity, and the reason for all these distinctions is not apparent; the moment that we repudiated the old principles and made of the indemnity of insurance a simple representation of the *res* (*une simple représentation de la chose*) it was necessary to be consistent and admit this fiction absolutely. The legislator has not done it from forgetfulness or inadvertence rather than in consequence of preconceived idea, because he has proceeded by special provisions and not by general rules. This is the inconvenience of these additional laws which, conceived and written from a special point of view, agree with very great difficulty with the general legislation of our codes, and in their relation with it give birth to regretable antinomies."

It is true that all French authors do not agree with the foregoing, and give a more restricted interpretation to the statute by which they exclude creditors by *privilége*. This, however, being a question going simply to the form of the legislative expression, does not concern our argument. The spirit and intent to render the insurance a representative of the vessel as to claims of appropriate merit are indisputable.

Indeed, authority so competent as Dr. Lewis, of Berlin, seems to have fully adopted Laurin's views, for in a note to p. 168, of the second volume of his treatise, published in 1878, entitled *Das Deutsche Seerecht*, after referring to the former view in favor of the shipowner's retention of the insurance, he adds:

Nach neuestem Recht ist aber der entgegengesetzte Grundsatz aufgestellt durch das Gesetz vom 10. Dezember 1874, art. 17. [Citing text of article.] Handelt dieses Gesetz zunächst auch nur von Hypothekenforderungen, so unterliegt es doch keinem Zweifel, dass der angegebene Grundsatz auch Anwendung findet auf die denselben vorangehenden *créances privilégiées*.

According to the latest law, however, the contrary principle is established by the statute of Dec. 10, 1874, Art. 17. * * While this statute, indeed, applies first of all to claims by hypothecation, yet there is no doubt that the principle involved applies also to the lien creditors who take rank before them.

In the third edition of the *Dictionnaire de Droit Commercial* by J. Reuben de Couder [Paris, 1877], the view against including insurance in the shipowner's *abandon* in case of collision, is stated as in prior editions, but the author expresses his uncertainty by adding: Vol. 1, p. 418, Nos. 103 & 104:

V. toutefois l'art. 17 de la loi du 10 Dec. 1874, sur l'hypothèque maritime.

However, see Art. 17 of the law of Dec. 10th, 1875, concerning maritime hypothecation.

Boistel in his *Précis de Droit Commercial*, 2d. ed. [Paris, 1878], considers this question, also the effect of the modification by the statute of 1874. In discussing the requirements of the shipowner's *abandon*, he asks, p. 885:

"If the ship was insured must he abandon the amount of the insurance? The negative has been formerly declared by a declaration made in the 'Preparatory Sketch' of the law of 1841, and it was said to justify it, that, the premium being paid out of his landed fortune, the insurance which represents it ought to be protected from the suit of creditors, who have treated with the captain.

But this rule violates the fundamental principle of insurance, for the owner will gain by the loss of his ship, since in place of a ship burdened with debts, he will have a sum of money perfectly free in his hands. Only *privilége* creditors would be subrogated to a right of indemnity."

## II.—German Authorities.

This question appears to have been early discussed and settled in the general Prussian Municipal Law (*Das allgemeine Landrecht*). The value and comparative merit of this system of legislation dating from 1794, is well set forth by Dr. J. F. Behrend, in F. von Holtzendorff's *Encyclopædie der Rechtswissenschaft, erster Theil*, pp. 366 *et seq.* In 1834, Pardessus criticised this code, as having too much detail and definition. He, however, adds:

"Nevertheless, it is one of the most remarkable monuments, and to jurisconsults also the most useful, which has been published in our modern times." (*Lois Maritimes* III., p. 457.)

Kaltenborn (1817–1866), in 1851, alludes to it as still being one of the most complete maritime codes of Europe, especially valued for thoroughness and practical worth. (*Grundsätze des praktischen Europäischen Seerechts*, Vol. 1, p. 31 [Berlin, 1851].

The question of insurance was put beyond controversy by the following provision of the statute:

Ist das Schiff versichert gewesen, so müssen den Gläubigern auch die Rechte gegen den Versicherer abgetreten werden. II. 8, § 1530, 2d ed., Vol. 3, p. 575 (Berlin, 1794).

When the ship has been insured, the rights against the insurer must also be ceded to the creditors.

Alluding to same law, Pöhls (1798–1849) in his *Darstellung des gemeinen Deutschen und des Hamburgischen Handelsrechts* [Hamburg 1828–1830] says, vol. 3, p. 234.

Sie können sich in allen Fällen von weiterer Verantwortlichkeit befreyen, wenn sie das Schiff, nebst dem Nutzen dieser Reise, und ihren Rechten an den Assecuradeur abtreten.

In all cases they can free themselves from further responsibility, if they surrender the ship, including all benefits of this voyage and their rights against the insurers.

Kaltenborn's treatise already cited is an important authority for several reasons. Besides being the only work published in the year of the passage of the Statute of the United States, and thereby furnishing evidence of contemporary maritime law in 1851, it is remarkable as treating these questions upon broad international principles as distinguished from a mere statement of local usages. It appears that for purpose of gathering material from the existing jurisprudence for this work, the writer journeyed to Hamburg and elsewhere to acquaint himself with the actual practice of maritime Courts. The author was subsequently a professor of law in the University of Koenigsberg. (*Allgemeine Deutsche Biographie*, vol. 15, p. 44, Leipzig, 1882.)

The following principles regulating shipowners' liability are laid down by this work:—

Das Römische Recht, welches den Rheder unbedingt mit seinem gesammten Vermögen für verpflichtet hält, ist nirgends praktisch und galt schon im Mittelalter nicht. Schon das Consolato del Mare, c. 183, 224, 236, das Wisbysche Seerecht, arg. artikel 13 and 68, Hanseat, arg. Art. 2, title x. lassen die Rhederei in der Regel nur bis zum Werthe des Schiffes haften; und die neueren Seerechte befreien die Rheder durch

The Roman law, which held the owner absolutely liable with all his property, is nowhere put in practice, and was not current as early as the Middle Ages. Indeed, the Consulate of the Sea (c. 183, 224, 236), the law of Wisby, reasoning from Arts. 13 and 68, that of the Hanse Towns, reasoning from Art. 2, Title X, render the owners, as a rule, answerable only to the extent of the ship's value; and the modern mari-

Abandon des Schiffes und resp. der Schiffspart von aller weiteren Verbindlichkeit an ihrer Schiffsunternehmung, namentlich an den Handlungen und Contracten des Kapitains. In dem Schiffe sind alle während der Reise erwachsenen Vortheile, so wie die Versicherung mit einbegriffen. Sollte das Schiff (sowie die Fracht) zu Grunde gegangen sein, so ist zur Befreiung der Rhederei hinreichend, wenn von ihr alle Ansprüche und Klagen, die auf dieses Schiff und die Fracht Bezug haben, abandonnirt werden. (Vol. 1, § 61, p. 149, 150. Berlin, 1851.)

time laws free the owners, by the *abandon* of the ship and their several shares in the vessel from all further liability for the ship-enterprise, particularly for the acts and contracts of the captain.

In the ship are included all gains arising during the voyage as well as the insurance.

Should the ship and the freight have perished, it is sufficient for exoneration of the owners, if all claims and causes of action having reference to the vessel and freight are abandoned by them.

The same principle is stated very concisely in Weiske, *Rechtslexikon*, vol. 9, p. 744. [Leipzig, 1855.] After saying that shipowners are personally liable, who knowingly participate in the culpability of their agents, it adds that—

"Otherwise they are only answerable as far as the value of the vessel goes, and to the amount of their enrichment by means of it" (*bis zum Belaufe ihrer Bereicherung dadurch*).

On April 17, 1856, the Germanic Confederation voted to call a conference to meet in December of that year to prepare a general commercial code for all the States.

The action of Prussia in response to this call is stated by Wendt in his papers on Maritime Legislation, London, 1871, as follows (p. xxvii):

"When the Germanic Confederation had decided in 1856 to convoke a meeting of delegates for the purpose of agreeing upon one general mercantile law for their whole territory, the Prussian Government appointed three committees of merchants, one in Stettin, one in Danzig, and one in Koenigsberg, to investigate and collect the most desirable body of maritime law, and when the German Commission met at Hamburg on the 26th of April, 1858, their Prussian colleagues were enabled to lay before them a well considered draft of a common maritime law, together with carefully complied reasons for same."

Makower, in an introduction to his edition of the German commercial Code (*Das Allgemeine deutsche Handelsgesetzbuch, Berlin*, 1880), *p. XVII.*, alludes also to this Prussian draft as being the production of:

"A number of merchants from different provinces, besides experts engaged in maritime and commercial law, and lawyers from all the various divisions of the Kingdom."

The practical experience of these committees of merchants with the skill of the maritime experts, aided by the aggregate learning of the jurists resulted in an entire agreement upon the question of insurance. The law proposed by the Prussian Government to the Federal Conference contained the following provisions:

Art. 407.

Für den Schaden, welchen der Schiffer oder die Schiffsmannschaft einem Dritten durch unerlaubte Handlungen in Ausführung der ihnen obliegenden Verrichtungen zufügen, sind die Rheder verantwortlich.

Sie können sich von dieser Verpflichtung durch Aufgabe ihres Rechts am Schiff, an der laufenden Fracht und an der Versicherung befreien.

The ship-owners are answerable for the damages which the master or the ship's crew do to a third person, through illicit acts, in course of performance of the business incumbent upon them.

They can free themselves from this obligation by giving up their rights to the ship, to the current freight, and to the insurance.

*Protokolle der Kommission zur Berathung eines allgemeinen deutschen Handelsgesetzbuches, von J. Lutz, Beilagenband*, p. 345. [Würzburg, 1858.]

Art. 682.

Das Pfandrecht der Schiffsgläubiger umfasst das Schiff, dessen Zubehör, die Frachtgelder und den Versicherungsanspruch von der laufenden Reise.

*Ibid*, p. 395.

The lien of the ship creditor embraces the ship, its appurtenances, the freight moneys, and the claim for insurance for the current voyage.

The reasoning of the distinguished delegates from Prussia, in support of these provisions, is preserved in the protocols of the Commission. One of the Prussian delegates was Dr. Pape, from Berlin, who, between 1850 and 1856, was a maritime judge at Stettin, and was subsequently President of the Supreme Commercial Court of the Empire (*Das Reichs-Oberhandelsgericht*) at Leipzig. This office he held from 1871 to 1879.

At the session of May 28, 1858, the question came up for discussion. The protocols (Vol. 4, p. 1606) are as follows:

Hierauf wurde zur Diskussion der Frage übergegangen, ob zur *fortune de mer*, mit welcher der Rheder den Schiffsgläubigern zu haften habe, im Falle eines Verlustes des Schiffes die Versicherungsgelder zu rechnen

Hereupon the discussion passed to the question, whether in case of a loss of the ship, the insurance moneys were to be classed with the fortune of the sea, with which the owner is answerable to ship's creditors so that

seien, diese somit von den Gläubigern in Anspruch genommen werden könnten. Von einer Seite wurde diese Frage bejaht und hervorgehoben: die beschränkte Haftung solle den Rheder vor der Gefahr schützen noch mehr, als das Schiff zu verlieren. Der Zweck werde einleuchtend erreicht, wenn auch die Versicherungsgelder zur Befriedigung der Gläubiger verwandt werden müssten. Es sei unbillig und ungerecht, die Rechtswohlthat der beschränkten Haftung so weit auszudehnen, dass in Fällen des Untergangs des Schiffes der Rheder die Versicherungsgelder, also das Aequivalent unverkürzt behalte, während die betreffenden Gläubiger sämmtlich leer ausgingen. Eine solche Ausdehnung der Rechtswohlthat müsse nothwendig dahin führen, dass in vielen Fällen der Untergang des Schiffes dem Rheder wünschenswerth werde. Den Fall angenommen, das beträchtliche Forderungen, für welche nur mit dem Schiff gehaftet würde, vorhanden seien, so bringe der Untergang des Schiffes dem Rheder den grossen Gewinn, das derselbe von allen Verplichtungen befreit werde und statt des mit Schulden belasteten Schiffes, dessen unbeschwerten Werth in den Versicherungsgeldern empfange. Zu der grossen Ungerechtigkeit und Härte gegen die Gläubiger, trete also noch der schwer wiegende Uebelstand, dass der Untergang des versicherten Schiffes dem Rheder vortheilhaft sein könne. Es fehle an einem genügenden Grunde, welcher die Gesetzgebung bestimmen könnte, eine von solchen Uebelständen begleitete Härte zu sanktioniren.

Man habe auch hin und wieder darauf verwiesen, das auch die Gläubiger die Forderungen versichern lassen könnten ; allein dies sei nicht immer der Fall, z. B. nicht wegen der aus rechtswidrigen Handlungen

they could lay a claim to it. Upon one side the affirmative of the question was held and it was put prominently forward: The limited liability should protect the owner from the danger of losing more than the ship. The object will obviously be attained, if also the insurance moneys are required to be applied to the satisfaction of the creditors. It would be unfair and unjust to extend the legal benefit so far, that in case of the wreck of the vessel, the owner should retain the insurance moneys, as the equivalent undiminished, while the creditors get absolutely nothing.

Such an extension of the legal benefit must necessarily, in many cases, render the shipwreck of the vessel desirable to the owner. Assume the case, that important claims exist for which only the vessel is liable, then the wreck of the vessel brings great gain to the owner, in that he will be freed from all obligation, and instead of the ship burdened with claims, he receives its unencumbered value in the insurance moneys. Besides the great injustice and hardship toward the creditor, there is also the weighty evil that the wreck of the insured vessel can be profitable to the owner. There is lacking a sufficient reason which can induce legislation to sanction a hardship attended by such evils.

Reference has indeed been now and then made to the point, that the creditors could also insure their claims. This, however, does not always happen, e. g. not against claims arising out of illegal acts of

des Schiffers herrührenden Forderungen, deren Entstehung sich ja nicht voraussehen lasse, ferner dann nicht, wenn eine Certepartie so eben abgeschlossen und in kürzester Zeit nach dem Abschlusse gebrochen worden. Schon das preuss. Landrecht habe daher mit Recht die Frage bejaht. Verneint sei dieselbe dagegen allerdings im Einklange mit dem holländischen Handelsgesetzbuche und der Bremischen Verordung vom Jahre 1832 in dem ersten der Berliner Conferenz vorgelegten Entwurfe. Bei der Berathung desselben hätten sich aber alle damals anwesenden kaufmännischen Kommissionsmitglieder für die Bejahung der Frage und die Beibehaltung der landrechtlichen Vorschrift ausgesprochen. Die Vorliegende Frage greife übrigens auch über das Gebiet des Seerechts [Introducing illustrations from civil law.] Die Rücksicht auf Recht und Gerechtigkeit für wohlbegründete Forderungen sei ohne Zweifel wichtiger als die Rücksicht auf das Interesse der Rhederei und die Sicherheit der kaufmännischen Spekulation. Endlich würde die Verneinung der Frage zur Vermehrung der Versicherungen führen, indem jeder Gläubiger, welchem gegenüber der Rheder nur beschränkt hafte zur Versicherung seiner Forderung sich genöthigt sehen werde, worin doch ebenfalls ein, wenn auch vielleicht geringer Uebelstand gefunden werden müsse. Berufe man sich aber auf das höllandische und das bremische Recht, so stehe diesen Rechten das preuss. Landrecht entgegen, welches über 50 Jahre in Geltung sei und, wie die Berliner Conferenzbeschlüsse erwiesen, Rheder und Kaufleute vollkommen befriedigt hatte.

the master, the beginning of which could not even be foreseen. Nor further when a charter party just entered into has been infringed in the briefest interval after its execution.

The Municipal law of Prussia has therefore already answered the question in the affirmative. To be sure, the negative was taken in the first draft presented to the Berlin conference in harmony with the Commercial Code of Holland, and the Bremen Ordinance of 1832. In the deliberation upon it, all the members of the Mercantile Commissions present declared for the affirmative of the question and the retention of the provision of the Municipal Law. The present question trenches over and outside of the domain of maritime law. * * * * * * Regard for the law, and justice toward well founded claims is, without doubt, of greater weight than regard for the shipowning interest and the security of mercantile speculation. Finally, the negative of the question would lead to increase of insurance in that every creditor toward whom the owner's liability was but limited would see himself compelled to insure his claim, in which case there would still be found an evil, though perhaps somewhat lessened.

If the laws of Holland and of Bremen are invoked, then these laws stand in conflict with the Prussian law, which is over fifty years in force, and, as the resolutions of the Berlin conference show, had completely satisfied both shipowners and merchants.

Notwithstanding these reasonings it appears that the Prussian delegates were outvoted. Two years later, on May 25th, 1860, the discussion was renewed before the Commission.

Having stated that the privilege of limited liability had been extended beyond what was contemplated at the earlier session, and that the considerations previously urged now applied with added force, it was further maintained in support of the motion to include the insurance (*Protokolle*, vol. 8, p. 4169) as follows:

Dass sich der Rheder, wenn dem Antrag nicht stattgegeben werde, in vielen Fällen auf Kosten der Schiffsgläubiger würde bereichern können, indem er einerseits durch den Untergang des Schiffs von den Schulden befreit werde, zu deren Deckung er das Schiff hätte hingeben müssen, und anderseits den Werth desselben vom Assekuradeur ersetzt erhalte, und dass diese Aussicht auf Gewinn einem unredlichen Mann leicht Anlass dazu werden könne, dass er nicht Alles thue, was in seinen Kräften stehe, um den Untergang des Schiffs abzuwenden. Gehe man davon aus, dass der Rheder für die Schiffschulden nicht mit mehr als dem der See anvertrauten Werth zu haften habe, so könne man doch nicht umhin, das Gesetz nun auch so einzurichten, dass er diesen Werth wirklich verlieren könne; es sei gewiss nicht gerechtfertigt dem Rheder die Möglichkeit zu geben, dass er sich zum Nachtheile der Schiffsgläubiger selbst diesen Werth rette. Zähle man die Versicherungsgelder nicht zur *fortune de mer*, so werde den Schiffsgläubigern die Tragung des Risiko des Schiffs aufgebürdet, obwohl sie mit Ausnahme des Bodmereigläubigers, von welchem deshalb auch im vorliegenden Antrag abgesehen werde, durch nichts zu erkennen gäben, dass sie zur Uebernahme eines Risiko bereit seien und obschon es unbillig wäre, ihnen dieses Risiko zuzumuthen und doch keine Art von Disposition über das Schiff zuzugestehen. Man möge nicht einwenden, dass es an einem juristischen Grunde für die beantragte Bestimmung fehle und dass das Versicher-

That unless the motion passes, the shipowner can enrich himself in many cases at the expense of the ship creditor, since on one side, the wreck of the vessel will free him from the claims, to pay off which he would have to devote the ship, and on the other side, he receives the value thereof made good by the insurer; and that this prospect of gain would easily become an inducement to a dishonest man not to do all within his power to avert the destruction of the vessel. If we proceed from this, that the shipowner has to answer for the claims on the ship, only to the extent of the value committed to the sea, yet we should not forbear to arrange the law, so that he could really lose this value. Certainly it would be unjustifiable to give the owner the possibility to save this value to himself to the prejudice of the ship creditors. If the insurance moneys are not counted in the *fortune de mer* the burden of bearing the ship's risks will be cast on the ship's creditors, although (with exception of the bottomry creditor, who however is put out of view in the present motion) they make known in nothing that they are prepared to undertake a risk, and although it would be unfair to impose on them this risk and still accord them no sort of power of disposal over the ship.

It cannot be urged in reply, that there is no juridical ground for the proposed provision, and that the matter between shipowner and underwriter, for the ship creditors, is a *res inter alios acta* which does not concern them; since the latter re-

ungsgeschäft zwischen Rheder und Assekuradeur für die Schiffsgläubiger eine *res inter alios acta* sei, welche diese nichts angehe, denn das letztere finde auch auf die in Art. 656 besprochenen Forderungen des Rheders Anwendung, und was das erstere angehe, so beruhe die Einführung einer beschränkten Haftung ja auch auf keinem juristischen Grundgedanken, sondern auf praktischen Zweckmässigkeitserwägungen, wie sie denn auch keineswegs bei allen seefahrenden Nationen sich finde; es könne somit auch bei Feststellung der Modalitäten dieser Haftbarkeit nicht darauf ankommen, ob sie sich durch streng juristische Schlussfolgerungen rechtfertigen liessen.

lates also to the claims of the shipowner, settled in Art. 656, and so far as concerns the former the introduction of a limited liability surely rests on no fundamental juridical idea, but rather on considerations of practical expediency by no means prevalent among all seafaring nations. Hence the establishment of the modal incidents of this liability does not hinge on the point whether it is vindicated by strong conclusions of a juridical kind.

This discussion was closed by the following arguments of two delegates in reply to objections to foregoing which had been presented by other members of the commission, p. 4171:

Unter den gegen den Antrag vorgebrachten Gründen sei nur der eine erheblich, dass mit der Annahme des Antrags der Fortbestand der Rhederei in ihrem bisherigen blühenden Zustand nicht vereinbar sei, und man lasse es dahin gestellt sein, ob derselbe unbedingt durchgreifend und eine so grosse Abweichung von den allgemeinen Rechtsgrundsätzen, wie die, deren Beseitigung der Antrag bezwecke, zu rechtfertigen geeignet sei. Die Hinweisung auf die Gesetzgebung Frankreichs passe nicht, weil dort das Abandonsystem bestehe, welches die Versammlung verworfen habe. Endlich handle es sich nicht darum, die Schiffsgläubiger an Stelle des Rheders in den Versicherungsvertrag eintreten zu lassen, sondern ihnen die dem Rheder gebührenden und wirklich anfallenden Versicherungsgelder als Executions-Objekt an Stelle des Schiffs zuzuwenden, wie dies auch bei versicherten Gebäu-

There is but a single material argument among those adduced against the motion—that the adoption of the motion is incompatible with the perpetuity of shipping in its hitherto flourishing condition, and it is left undecided whether it is justifiable to make a divergence from general legal principles which is so absolutely radical as this, which the motion aims to obviate. The reference to French Legislation is inapplicable because there the system of *abandon* is in force which the convention have rejected. Finally, the point in question is not to admit the ship creditors into the insurance contract in place of the shipowners, but to allow them the insurance moneys falling due and actually devolving on the shipowner as an object of execution in lieu of the ship, as is also the case with insured buildings in respect to hypothecation creditors. The question here is not whether or what interest the ship-

den bezüglich der Hypothekargläubiger der Fall sei. Ob und welches Interesse der Rheder an dem überschuldeten Schiff habe, komme hier nicht in Betracht. Brauche der Assekuradeur nicht zu zahlen, so würden auch die Gläubiger nichts erhalten. Ausserdem sei es dem Assekuradeur gleichgültig, an wen er zahle, wenn er nur durch die Zahlung befreit werde.

Von einem anderen Herrn Abgeordneten wurde hinzugefügt: Die Gesetzgebung Frankreichs sei in der vorliegenden Frage um so weniger maasgebend, weil die in Frankreich zu Ungunsten der Rhederei und namentlich des Schiffsbaus bestehenden Zoll- Prohibitiv- u. s. w. Gesetze gleichfalls Privilegien und Monopole zu Gunsten der Rhederei hervorriefen, wie überhaupt ein industrielles oder merkantiles Monopol zum Schutz der dadurch Beeinträchtigten ein zweites Monopol bedinge, oder doch häufig zur Folge habe. Uebrigens habe der Seehandel so vieler im Alterthum, wie in der späteren Zeit durch Schifffahrt reich und mächtig gewordener Völker den unwiderleglichen Beweis geliefert, dass der Rhedereibetrieb recht wohl bestehen, ja zur höchsten Blüthe gelangen könne, ohne durch das sowohl gegen die sonst bestehenden allgemeinen Rechtsgrundsätze, als gegen das Rechtsgefühl verstossende Privilegium des Art. 424, geschützt zu sein, nach welchem sich zwar der Rheder gegen jeden Schaden sicher stellen könne, der Schiffsgläubiger aber, welcher dem Rheder Geld und Gut dargeliehen und ihm zum Rhedereibetrieb die Mittel vorgestreckt habe, im Falle des Untergangs oder der Entwerthung des Schiffs, ganz oder theilweise unbefriedigt bleibe. Ein solches Privilegium sei daher weder handelspolitisch gerechtfertigt, noch ökonomisch, letzteres nicht, weil es der Rhederei die nöthigen Kapitalen

owner has in the encumbered ship. If the insurer does not have to pay, then the creditor would receive nothing. Besides, it is immaterial to the assurer to whom he pays, if he be only exonerated through the payment.

Another delegate added: The French Legislation is the less a standard for the present question since the existing French custom, prohibitory and other laws against ship-owning, and especially shipbuilding have likewise called into being a privilege and monopoly in favor of the shipping interest, as usually an industrial or mercantile monopoly (by the protection of the interests thereby invaded) necessarily involves a second monopoly or is attended with one in the sequel. Moreover, alike in antiquity and in later times, by fact of nations grown rich and powerful through shipping, uncontrovertible proof has been furnished that maritime commerce subsists very well and could attain even to the most flourishing condition unprotected by the privilege of Art. 424—a privilege opposed to elementary legal principles as well as offensive to legal perceptions. By it, the owner could indeed make himself secure against every harm, but the ship creditor who has loaned money and goods to the owner, and has supplied the means of carrying on the shipping business, in event of the destruction or deterioration of the vessel, remains totally or partially unpaid. Such a privilege is justified therefore neither in commercial politics nor on economic grounds, since, as to the latter, it renders the necessary capital dearer to shipowners.

vertheure. Anderseits sei selbst die Gefährdung der Schiffe, der Ladungsgüter, und der Mannschaft nicht ausser allem Zweifel.

On the other hand, even the endangering the vessel, cargo and crew would not be beyond all doubt.

Notwithstanding these objections, the delegates, acting under instructions from their home governments, rejected the motion. The code subsequently enacted, therefore, makes no provision for insurance being subject to claims of creditors. In accordance with its obligation to the confederation, Prussia adopted it in that form, and since March 1, 1862, the former statute on the point has been superseded.

In connection with this controversy, this court is referred to the fact that besides Holland, two other countries have expressly enacted that the insurance shall *not* be comprised in the shipowners' *abandon* to creditors. These are Belgium (law of June 19, 1855), and Finland (Maritime Code of 1874, *Art.* 17). It is, however, confidently submitted that neither of these statutes indicates the existence of such a negative provision in the General Maritime law. Rather the contrary—that insurance *is* so included by the general law, and that nothing but an express statute can exclude it.

## III.—Deductions from foregoing.

This examination of the French and German authorities, it is submitted, leads to the following conclusions:—

1. The equity to insurance was deduced by the French courts from a statute prescribing an *abandon* only of ship and freight.

2. It has been maintained by Valin and Pardessus and was earnestly advocated by the highest French judicial authority, viz.: the magistrates of the Court of Cassation.

3. The equity to insurance was denied by the chamber of Peers in 1841, in opposition to the wish of the highest court, on grounds that were professedly temporary and local.

4. Although French jurisprudence on this point may be unsettled, evidencing a transitional stage in its development, the latest expression of the legislative will is in the direction of restoring the insurance equities to all creditors who have a specific lien on the vessel.

5. That the express enforcement of this equity by Prussian

legislation for over fifty years was completely satisfactory to both ship owner and creditor; and that the first attempt of Prussian jurists to change the law in imitation of the supposed policy of France was met with unanimous remonstrance from the shipping interest represented at the Berlin conference.

6. That the ultimate reversal of the law was against the protest of Prussia, and was accomplished by votes of nations, many of whom had much less at stake in maritime affairs, and at a period when the example of supposed French legislation was much more influential than at present.

7. That it needs no argument to establish that a principle, authoritatively announced by Valin, supported by Pardessus, practically enforced by the French courts, urgently advocated by the supreme judicial authority of France, administered successfully for over half a century in the great Prussian ports of the Baltic, and sanctioned by the chief legal authority of Berlin, is in fact a veritable equity in maritime law, and worthy the adoption of this tribunal.

## IV.—Nature of Insurance.

The idea that insurance money is derived from something so remote from the insured subject matter, as to come to the insured's hands free from all obligations to third persons, is based upon an early theory of this contract which is now rejected. At the first appearance of insurance contracts as commercial facts, the mediæval jurists were unable satisfactorily to adjust the new product of mercantile life to previous legal theories.* When it was found impracticable to bring insurance under the rubrics of the Roman law, it was treated as a mere *emptio spei* or *rei speratae*—a sort of game or wager—and was hence put outside the pale of ordinary legal principles. Regarded as sheer matter of hazard—one of the *gewagten Geschäfte*—it was thrown into the category of aleatory contracts. In fact, this classification still survives in French statutory law.

Code Civil, § 1964.

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*In Valin's time this difficulty continued. Speaking of insurance he says: "Les Docteurs se sont beaucoup fatigués dans la recherche de la nature de ce Contrat." Vol. II. p. 26 [ed. 1766.]

The difficulty of entire emancipation of jurists from the influence of this rejected wager theory of insurance has been recently remarked by continental authorities.

Holtzendorff's *Rechtslexikon*, Vol. 3, p. 1080 [Ed. 1881.] by Dr. Carl Gareis of Giessen.

Of course, if it be sound that insurance is such a mere expectation of gain, derivable from a wager tolerated by the law, but quite outside of the subject matter of the hazard, then the proceeds of the wager cannot consistently be applied to the payment of any lien on the destroyed object, no matter how meritorious a cause of action may exist.

The actual practice of the law is otherwise.

Section 37, of the Shipping Law of Norway of 1860, provides that the insurance money on the vessel shall be directly liable for the claims of seamen, who have, in that country, as in others, a lien superior to many classes of creditors. Hallager, *Den norske Söret*, pp. 114, 319, [Christiania 1873].

Indeed, Emerigon himself implies, in the quotation already cited, that the wages of seamen is the main object of insurance, and that if the insurance money is diverted from them to outside creditors this object would be lost.

Dufour, also (vol. 1, p. 373), sums up Emerigon's reasoning in these words:

"If this privilege be accorded to supplymen and workmen, it will have to be accorded to other creditors; and yet how will the sailors profit by it, for example? By this means the object of insurance will fail."

Elsewhere also Emerigon takes a similar view against the wager theory of insurance. This occurs in discussing the point whether in case of insurance on a ship which is thereafter lost, the owner can recover the insurance, and also hold the freight due on any cargo that is saved. And he holds that he cannot. He says [*Traité des Assurances*, *t.* 2, *p.* 221, *Marseille*, 1783]:

"The contract of insurance is not a lucrative contract. Its only object is to protect the insured from loss. In the course of the voyage, the real value of the ship diminishes, the provisions are consumed, the advances made to the sailors are absorbed. But all that is recompensed by the freight. It is the freight which preserves to the ship its primitive value. What the ship loses on one side, it recovers on the other by the freight, which is its accessory. Your ship, which when it departed from Marseilles was worth 50,000 livres, at its return is worth but 20,000 livres. You have

no complaint, because the freight recompenses you for this decrease of value.

If your ship is wrecked coming into the port of Marseilles, it is odious that you should on the one hand demand from your insurers 50,000 livres, and on the other, the entire freight of the cargo saved. The disaster would enrich you at the expense of the insurers. Such a system must be condemned as contrary to equity and to the nature of the contract."

In 1875 Sir John Lubbock expressed the following views on the law of marine insurance, in a speech in Parliament, published in a volume of Addresses [London, 1879.] Speaking of valued policies, he said, p. 148:

"In the present state of the law, however, it is actually, in some cases, better for the shipowner, in a pecuniary point of view, that his ship should be lost. Surely such a state of things is entirely contrary to public policy and the true principles of insurance."

A practical instance of admitting the equities of third parties to share in the benefits of insurance contracts is found in the English legislation, which still subsists in the city of London. In 1774, it was there enacted that upon the request of any persons *interested or entitled to any house insured* which might thereafter be burned, the insurers were authorized and *required* to expend the insurance money in reinstating or repairing the property, so far as it would go, unless the insured give security to rebuild, or unless within sixty days the parties adjusted their differences.

Statute 14, Geo. III., Chap. 78, Sec. LXXXIII.

French legislation in May 28, 1858, expressly subjected certain insurance on personal property to creditors' liens. In a statute regulating *Magasins généraux*, certain creditors were given a *privilége*, by virtue of holding receipts and warrants. This *privilége* extended to the insurance by following article:

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| 10.—Les porteurs de récépisés et de warrants ont sur les indemnités d'assurance dues, en cas de sinistres, les mêmes droits et priviléges que sur la marchandise assurée.<br>Sirey D. et C., Lois annotées an 1857, 1858, pp. 73, 74. | Holders of the receipts and the warrants have the same rights and liens upon the indemnity of insurance, in case of loss, that they have upon the merchandise insured. |

There is another consideration particularly applicable to a question of marine insurance when it is claimed that the contract is wholly outside of the subject matter at risk. Maritime law itself

recognizes and enforces the connection between them, during the various stages through which the contract passes.

First.—Before the premium is paid, the law gives the underwriter a lien for the premium upon the vessel itself. This is provided for by a majority of commercial nations.

France, Code de Commerce, § 191, sub'd. 10.
Belgium, Art. 23 of Law of June 11, 1874.
Italy, Commercial Code of 1883, Art. 677, sub'd. 8.
Spain, Com. Code, § 598.
Portugal, Com. Code, § 1300, 1307.
Chili, see Hoechster & Sacré Droit Com. Maritime, p. 1330.
2 Flipp, Rep., 437, notes.
Weiske, *Rechtslexikon*, Vol. 9, p. 741.
Malynes *Lex Mercatoria*, p. 148 (London, 1685).

This principle has been adopted by the Federal Courts, and has received the sanction of Mr. Justice Swayne sitting at Circuit.

The Dolphin, 3 Central L. J., 628, 1 Flipp, 580, 592.
The Illinois, 2 Flipp, 431.

Second.—Payment of the premium, therefore, is an extinction of an encumbrance upon the vessel. Hence it enhances the interest of the owner in the vessel to that extent. This rests not only upon deduction from the preceding principle. It is explicitly asserted by Valin. According to the Ordinance of 1681 (Liv. III., Tit. VI., Art. XX), the premium was treated as a maritime outlay, and could itself be insured. Commenting on this, Valin says:

Cet article permit de plus à l'assuré de faire assurer le coût d'assurance, à quoi est aussi conforme l'art 9, du ch. 2 du Guidon: & cela est juste, parce que cette prime, qu'il l'ait payée d'avance ou non, augmente d'autant la valeur de la chose, qu'il a intérêt de faire assurer pour courir moins de risque.
(Com., Vol. 2, p. 67.)

This article permits, moreover, the insured to insure the cost of the insurance, in which it is also in accordance with Art. 9, Chap. 2, of the Guidon, and this is just, because this premium, whether he has paid it in advance or not, augments by so much the value of the *res*, which he has an interest to insure, in order to run less risk.

To the same effect are—

*Code de Commerce, Art.* 342.
Persil, *Traité des Assurances ter.* p. 118 (Paris, 1834).
*Código de Comercio* (Spain) Art. 852.

In fact Valin's precise expression, that premium increases the value, is employed by the commentators on the later code, (*la prima assegurada aumenta el valor de la cosa*). De la Serna & Reus y Garcia, Código de Comercio, p. 351, Madrid, 1878.

Although there is no express provision of the German Code for insuring the money paid for premium, Dr. Lewis states in his treatise, that the premium for insuring a vessel and freight, falls in the same category with other expenses of outfit.

*Das Deutsche Seerecht*, Vol. 2, p. 189.

In the third volume of the *Cours de Droit Maritime* by Cresp-Laurin, the writers refer to Art. 342 of the French Code, permitting insurance of the premium, and state the principle of the rule as follows:

Pourquoi ? Parce que cette prime augmente d'autant la valeur de la chose en risque ; comme tous les autres frais, impenses ou loyaux-coûts, *elle fait partie de la valeur*, elle entre dans la facture.
Vol. 3, p. 446, Paris, 1882.

Why ? Because the premium increases by so much the value of the thing at risk ; like all the other outlays, expenses or just costs, it makes part of the value, it enters into the schedule.

What then becomes of the argument, sometimes gravely put forth, that insurance money is inaccessible to the ship creditor, because its cost is paid from the land fortune of the owner ? True, the premium may come from the land fortune, which may also have supplied the outfit of the voyage, and, indeed, for that matter, the vessel itself. But it is not what comes from, but what stays in the land fortune that the law keeps from maritime claims. It has not been doubted that, with the vessel, creditors take all claims of its owners for injuries thereto by third parties, and all his right to indemnity by general average.

De Couder, *Dictionnaire de droit com.*, Vol. I. p. 418, § 104.
Cresp, *Cours de droit maritime*, Vol. I, p. 633.

Yet these claims are not realized without pecuniary outlay. The source of the expenditure has never changed their character. The decisive fact is their purpose. Appropriated from whatever fund, they are paid as shipowner, and not as land owner. There is no injustice in this. The legal distinction between these two

interests is strictly artificial. By it, the land fortune is conclusively presumed to have acquired irrecoverably all profits of a prior voyage, at the instant of its completion, however contrary that may be to truth and reality. On the other hand, moneys are actually applied to increasing the sea fortune. To deny that insurance premiums do this, is to dispute elementary authorities that go back to the Guidon. If the cost of insurance has increased the value of the sea fortune for purpose of measuring indemnity to the owner, its value must be increased for purpose of measuring reparation by the owner.

Third.—After occurrence of a loss, even if not total, nor followed by any abandonment, the insurer is subrogated to the owner's rights, and is invested with the power to bring actions directly against third persons.

Court of Cassation, 12 Aug., 1872, *Sirey*, 1872, I. 323.
Deloynes, *Questions d' Abordage Maritime*, p. 10. (Paris, 1878).

This principle has been recently adopted by this Court.

The Potomac, 15 Otto, 630.

Fourth.—It is the practice of some jurisdictions to permit the insurers, even after a proffered abandonment, to repair and return the vessel, in full satisfaction of their liability—which is consistent with true theories of insurance, although difficulties of administering the rule prevent its extended application.

Wood *v.* Lincoln Ins. Co., 6 Mass., 479.
Commonwealth Ins. Co. *v.* Chase, 20 Pick., 142.
Reynolds *v.* Ocean Ins. Co., 22 Pick., 191.

Hence it is submitted :

That insurance moneys are a veritable representative of some subject of property. To say otherwise would be a return to the wager theory. To say they represent the physical object insured may be open to objection. To affirm, however, that the proceeds of the insurance represent merely the premium, is unsound and untrue—unsound, because it falls back on the discarded wager doctrine, and untrue, because in reality payment of premium alone, without right or title, gives no claim to the insurance moneys.

Unless the insurance contract is a mere wager, its proceeds must represent the subject matter to be indemnified. But this subject matter is not the physical object destroyed. It is the proprietary ownership, the right or title of the insured, that insurance makes good and represents. In a word, the insurance money restores, represents, and replaces the insured's interest, in the object sustaining the injury.

## V. The U. S. Statute.

Pardessus gave, as a reason for including the insurance, that the shipowners' act in discharge of liability, was in fact a transfer of title, a giving in payment. If the abandon was a cession or conveyance, it carried with it the insurance as a necessary incident.

The adversaries of the doctrine do not dispute this deduction. Instead they assail the premises. Accordingly Boulay-Paty, writing in opposition to Pardessus' opinion, rests his case on the theory that the shipowner does not make a transfer to the creditor, but simply withdraws his responsible ownership. Thus in his *Droit Maritime*, he says of the shipowners' act:

C'est une simple déclaration du propriétaire du navire, de ne prétendre rien à cette propriété. * * * L'abandon n' est qu' une renonciation à la propriété de la chose, pour n' être pas tenu des dettes qui la grèvent, et non pour en transmettre la propriété à d'autres.
(Vol. I., p. 294.)

It is a simple declaration of the shipowner that he claims nothing in this property. * * * The abandon is only a renunciation of the property in the *res*, in order not to be held for the debts which encumber it, and not to transfer the property to others.

Forty years afterwards this question of insurance was examined by De Courcy, who, with Dufour, was in 1865, a member of the Commission appointed for revision of the Maritime law of France. The controversy between Boulay-Paty and Pardessus was restated by him in the question: whether the shipowner's *abandon* was an absolute divesting of his ownership and transfer of it to creditors, or was merely a means of liquidation.

This very controversy seems also to have divided the jurists of Holland. Their difference as stated by them is whether the *afstand* or *abandon* is a *datio in solutum* or a simple *derelictio*.

De Wal, *Het Nederlandsche Handelsregt*, Vol. 2, p. 56. (Leiden, 1869).

De Courcy's opinion on the point and of the authority of Boulay-Paty was as follows:

Je ne fais pas le plus léger doute que l'abandon est une dépossession absolue de la propriété, qu' il ne peut pas être autre chose et qu'il ne réserve aux armateurs aucun droit quelconque, sur le navire abandonné ni sur son produit. Et je trouve la prétendue question si peu sérieuse, même grammaticalement, que sa véritable formule me paraît être la suivante ; l'abandon du navire est il un abandon du navire ? Il n'est cependant pas de vérité si évidente que n'ait contestée l'intérêt du plaideur. On a donc eu le courage de soutenir que l'abandon imposait aux créanciers le devoir de poursuivre la vente et réservait sur le produit, des droits aux armateurs ; qu'il n'était en un mot qu'un moyen de liquidation. Et l'on s'est appuyé de l'opinion d'un commentateur, M. Boulay-Paty, lequel, je me hâte de le dire, est une autorité fort peu imposante. L'opinion qu'il a exprimée à cet regard est certainement erronée."

*D'une Réforme Internationale du Droit Maritime*, pp. 50, 51 (Paris, 1863).

I do not entertain the slightest doubt that *abandon* is an absolute divesting of ownership, that it can be nothing else, and that it reserves to the owners no right whatever on the abandoned ship or its product. And I find the alleged question so little serious, even grammatically, that the true formula seems to me to be the following: The abandonment of the ship—is it an abandonment of the ship? It is, nevertheless, not so plain a truth that the pleader's interest has not contested it. They have had the hardihood to maintain that an *abandon* imposed on the creditors the duty of following the sale, and reserved to the owners the rights on the product; that, in a word, it was only a means of liquidation. And they have supported themselves by the opinion of a commentator, M. Boulay-Paty, who, I hasten to say, is an authority of very little weight. The opinion which he has expressed in regard to this is certainly erroneous.

Those later French authors that oppose including the insurance in the shipowner's *abandon*, occupy substantially Boulay-Paty's position, viz.: That a beneficial transfer is not required, but that the law is satisfied by a mere withdrawal of the responsible ownership. Perhaps the French law leaves this an open question. But the plain terms of the United States Statute of 1851 hardly leave room for discussion on this point. The lawgiver's words are unequivocal and decisive against the theory advanced by Boulay-Paty.

*First.*—The requirement of the statute (R. S., § 4285), is not an abandonment, renunciation, or disclaimer of ownership. It must be a *transfer*. Exactly the word of Pardessus—which everywhere imports a complete cession leaving no rights remaining in the original owner.

*Second.*—The subject matter to be transferred is not the mere vessel and freight, which the French Code calls for. Our alternative is, "If he shall transfer his *interest* in such vessel and freight." *Interest* is more comprehensive than right, title, or ownership. It includes all resulting and incidental advantages—present and future—connected with ownership, or touching property considerations. Primarily denoting influence of near objects—the being between, *inter esse*, the word early grew to mean every derivative and secondary property, gain or loss, as distinguished from a direct and primary ownership. In this sense (which preceded the popular use), the word was current as a law term as early as the twelfth century.

Littré, *Dictionnaire*, *Intérêt.*
Grimm. *Wörterbuch*, *Interesse.*
Skeat, Etymological Dict., *Interest.*

The word still conveys a subjective sense. When ownership is in question it looks rather to the results on the person, than to mere object owned. It therefore includes every effect or influence of ownership collateral as well as original.

Hence to transfer one's interest is to deprive and divest the transfer or of every right or incident of a right, and to substitute another in the enjoyment of all accessories of the original ownership.

*Third.*—The statute goes further. Lest anyone should raise the question of the legal nature of the shipowner's act, and should contend that it was a simple means of liquidation, the lawgiver has silenced objectors by adding that the transfer is "for the benefit of such claimants."

Liability, therefore, does not cease, until every interest and all elements of interest are surrendered.

An insurable interest obviously is an interest in the vessel and freight.

If ceded and transferred for the creditor's benefit, it leaves in the shipowner no equitable basis for receiving or retaining the insurance. The time of payment by the insurer is immaterial.

If paid over after the transfer of interest for the creditor's benefit, the proceeds are taken and held in trust for the creditor, whom the law has made the beneficiary.

If it be contended that equitable principles of this kind are inapplicable to this statute, the answer is, the legislation of Massachusetts and Maine, from which the federal act was derived, expressly devolved the adjustment of these questions upon the equity side of the Court, and granted to both parties the right to invoke its exercise by bill.

2 Mass. Laws (1823), p. 497.

Congress also intended equitable principles to aid and control the appropriate proceedings, sanctioned by the Act of 1851, and laid a direct foundation for application to equity by providing for the appointment of a trustee.

Should it be remarked that the National Steam Navigation Company are limiting their liability under R. S., § 4283, and have therefore made no transfer, the answer is not difficult.

The measure of liability under § 4283, is but the valuation of the same objects which are to be to be transferred under § 4285.

Whatever in one case would pass to a trustee, in the other alternative it is to be valued. Every element going to make up the amount of the shipowner's interest is to be the subject of valuation.

## VI.—Lien for Collision.

While it is true that seamen (whose claims are admitted to the insurance) were preferred to all other creditors by the French Ordinance of 1681 (Liv. I, Title XIV, Article XVI), modern codification has subordinated their rights to other equities. Thus the Italian Code of 1883 (Art. 677), as well as the Code of Spain (Art. 598), gives them only fifth place in order of liens, and while they have but the fourth rank by the Code of Germany (Art. 758).

The lien of supplymen, whom Valin admitted to the insurance was postponed by the Ordinance both to seamen and claims arising in course of the voyage.

In our own law collision creditors stand first.

This Court has authoritatively declared that "Liens for reparation for wrong done are superior to any prior liens for money borrowed, wages, pilotage, &c."

Norwich Co. *v.* Wright, 13 Wall., 104, 122.

The question of postponement of seaman's wages to lien for collision has been also directly adjudicated in

The Maria & Elizabeth, 12 Fed. Rep., 630.

By the latest foreign law also the lien of seamen only extends to the value of vessel and freight, and therefore is no different from that by collision.

Dalloz, 79, 1, 458.
Valroger, *Droit Maritime*, vol. 2, p. 95 (Paris, 1883).

The considerations that permit any class of ship creditors to reach the insurance, must apply *a fortiori* to the case of the Scotland lien for collision.

## VII.—English and American Decisions.

In 1846, Baron Parke, in the English Exchequer, comparing the English Statute with the maritime laws of Continental States, expressly says that according to the latter, if the vessel be lost—

"the owners are altogether exempt on abandoning the benefit of insurance, if any, and salvage." Brown *v.* Wilkinson, 15 M. & W., 396.

Likewise, this Court in Norwich Co. *v.* Wright, 13 Wall. 117, in enumerating claims of the owner to be surrendered, specify "insurance, &c." and cite Pardessus as authority. Nevertheless, certain other Federal Courts have expressly held otherwise. In none of them, however, had the foreign law been very fully presented. The sole authority for including the insurance has been taken to be the text of Pardessus. Even that authority, as read by Judge Kane, was only "a single line," "unsustained by argument or authority."

Watson *v.* Marks, 2 Am. Law Reg. 157, (1851).

The subsequent proceedings in the Norwich Case (8 Ben. 312) involved the question of *fire* insurance. The French law was there discussed.

The learned District Court cites, on the question of insurance, three treatises and two adjudged cases from France. The treatises are Boulay-Paty's work, already mentioned (of which the last edition was in 1834), Pouget *Principes du Droit Maritime*, pub-

lished in 1859, and Caumont, *Dict. du Droit Maritime*, which last appeared in 1867. None of the above, therefore, can be authorities under existing French law as modified by Act of 1874.

The first adjudication cited was Rennes, 12 Aug. 1822. It is reported in Sirey, 1822–1824, II, p. 111. The controversy was between owner and shipper to whom the former had made an *abandon* of the vessel. The case is but a re-statement of Boulay-Paty's view already quoted, and was decided in the town in which he lived, in the very year that his book appeared. The opinion professes to go upon the ground that the *abandon* was not a transfer, for the court says at the outset that—

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|---|---|
| l'abandon autorisé par l'art 216 du même code du navire et du fret, n'en transmit pas la propriété. | the *abandon* of ship and freight authorized by Art. 216 of the same Code does *not* transfer the property. |

Hence, the case is predicated upon a view of the law diametrically opposed to our own. The case has been criticised by De Courcy in the work already cited, in which he remarked upon Boulay-Paty's authority, also by Regnault in Revue Critique de Lég. 1876, p. 650. Whether good or bad law in France, it is therefore inapplicable to our statute.

The other decision referred to is cited as Aix, 8th Feb'y, 1832. Careful search in the *Journal du Palais*, the *Recueil* of Sirey, the *Jurisprudence Générale* of Dolloz fails to show any record of a decision of that date, but the reference undoubtedly is to the decision of Aix, 8th Feb'y, 1831, which is sometimes cited in text books as sustaining the point that insurance is not included in the abandonment. This case, Tourel *c.* Fabry, does not seem to be reported in full—only the head note being given in the *Journal du Palais*.

Whatever it may have been, it was reversed in the Court of Cassation on July 1, 1834. (*Journal du Palais*, 1834-1835, p. 686; Sirey D. & C *Recueil*, 1834, 1, 515; and Dalloz, *Jurisp. Générale*, 1834, 1794) and the *abandon* by the ship owner held ineffectual to exonerate him. It clearly appears in the introductory statement of Dalloz that the reversed judgment of the Court at Aix attempted to exclude the insurance, from the abandonment. There was, however, no discussion of the question of insurance in the opinion on appeal. Although the reversal by the Court of last resort does not always import the same finality in France as in this country, there is an ample reason for rejecting this case. Ten years later

this very Court was cited for the contrary opinion. It even appears that in the convention of 1841, the judges refused to support any law that interfered with the creditor's right to insurance (see *supra pp.* 9, 10.) It is therefore submitted that a decision, overturned at home, and in principle disavowed by the Court making it, has no claims to be reinstated abroad.

In the Circuit Court in the Norwich case (17 Blatch., 229), the learned justice referred to some of the same treatises that were relied on below, and in addition, cited Devilleneuve et Massé *Dictionnaire du Contentieux commercial*—the 5th edition of which was issued in 1851—also Bédarride *Commerce Maritime*, which, from the paging of the citation, apparently was quoted from the edition of 1859. Furthermore, the conclusions of this author are invalidated for United States Courts, because he maintaines that the *abandon* is never operative as a transfer, (*jamais translatif de propriété.*)

Bédarride, *Droit Com. Marit.*, I., § 291.

That the foreign authorities were not fully presented appears from the fact that the Court were not advised of any of the later authorities requiring cession of insurance since Pardessus. The learned justice admits that no other authorities holding same view were cited. (17 Blatchf., p. 326.)

The case of the Peshtigo, 2 Flipp, 466, decided by Judge Brown, in 1879, is little more than a review of the authorities in the Norwich case, but one additional author being cited, viz.: De Fresquet, *Des Abordages maritimes* (Aix 1869), whose remark on this point (p. 101) that a proposal to include the insurance had been made and rejected, is really little more than "a single line."

The decision of Mr. Justice Blatchford, in Thommessen *v.* Whitwill, involving peculiar facts, is expected eventually to come up for review in this Court. The libellants therein, in submitting this brief on the general question, regard it improper at this time to make any comments upon their own case.

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Proctors for J. THOMMESSEN *et al.*

HARRINGTON PUTNAM,
Advocate.

March, 1883.

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# SUPREME COURT OF THE UNITED STATES,

**OCTOBER TERM, 1885.**

No.....

JOSEPH W. DYER, *ET AL.*, APPELLANTS,

*vs.*

THE NATIONAL STEAM NAVIGATION COMPANY.

## BRIEF

**Submitted by leave of the Court, by Counsel for owners of the steamer "City of Norwich," on the question of the limitation of the liability of ship-owners, under the Statute Law of the United States, and under the general Maritime Law.**

J. W. C. LEVERIDGE,
*Proctor.*

JEREMIAH HALSEY,
*Advocate.*

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## PRELIMINARY NOTE.

The question involved in this proceeding, whether insurance upon a ship is included in the amount of her owner's liability under the Act of Congress limiting the liability of ship owners, is also involved in the appeal of Place, *et al.*, *vs.* The Norwich and New York Transportation Company, owners of the steamer "City of Norwich," pending in this Court.

In view of the fact that the case of the "City of Norwich" was the first case in which this Court was called to consider the question of "limited liability," and of the fact that the appeal involving the above question has been pending here for decision for a considerable period prior to the appeal in the case at bar, and as the decision of the question will affect the owners of the "City of Norwich," equally with the parties to the present proceeding, leave has been asked and obtained to submit the suggestions contained in this brief.

**The proposition contended for in this brief is, that insurance upon a ship is not included in the amount of her owner's liability under the Act of Congress to "Limit the Liability of Ship-owners," nor by the rule of the general Maritime Law.**

This question has not been expressly determined by this Court.

Expressions used in opinions pronounced by this Court, would indicate that insurance recovered formed no part of the amount for which ship owners are liable under the Act, as in "The Benefactor," p. 246, where it is said: "Whereas our law, following the admiralty rule, limits the liability to the value of the ship and freight after the injury has occurred: so that if the ship is destroyed the liability is gone, and whether damaged or not damaged, the owners may surrender her in discharge of their liability."

So in "The North Star," 106 U. S., page 29, "for the 'Ella Worley' by her loss discharged her portion of the common burden, and so much more as the amount that would thus be decreed in her favor. *Her delivery to the waves was tantamount to her surrender into Court in case she had survived. It extinguished the personal liability of her owners by the operation of the maritime rule itself.*"

So in Norwich Company v. Wright, 13 Wall., page 126, "But it will be observed that the Act of Congress contains a provision for the ship-owner to discharge himself, as in the maritime law by giving up the vessel and her freight."

Also, that the rule of the Maritime Law limited the owner's liability to the vessel and her freight.

Also, in "The Scotland," page 28, "In the case of Norwich Company v. Wright, (13 Wall., 104) we had occasion to state that the general maritime law of Europe only charges innocent owners to the extent of their interest in the ship for the acts of the master and crew, and that if the ship is lost their liability is at an end."

Also, in Moore v. Am. Transp. Co., 24 How., page 39, Nelson, Justice, in giving the opinion of the Court says: "The act not only exempts the owner from the casualty of fire, but limits his liability * * * to an amount not exceeding the value of the vessel and freight."

This question has been before the District and Circuit Courts in different Circuits and Districts, and has been discussed with great learning and ability by counsel and by Court, and the decisions have been uniform against the claim of the appellants.

The first case in which the question arose was that of Wattson v. Marks, 2 Am. Law Reg., 157, in the Eastern District of Penn., before Judge Kane. The steamer had been stranded and totally lost. The libel was on a contract of affreightment. The steamer was insured.

The learned Judge says, page 167: "Recognizing then, the liability of the owners upon a contract of carriage like this, I am of opinion also, that such liability is at an end, upon the total destruction of the vessel and loss of freight, before the completion of the voyage. Nor is there anything, as it strikes me, in the circumstance that the vessel was insured, and that a loss has been paid on her, or is still payable. The limit of the liability, the subject matter of the surrender in discharge of it, was the 'value and amount of the owners' interest.'

"If the vessel had ceased to exist, if the wreck was complete, and there is no longer property in her, or in her remains for any one—the owners' interest is gone. He has nothing to surrender. There is not a word in the Act about the insurance moneys, which he has received, or might claim. *These are not his interest in the vessel.*"

"The policy of insurance is a distinct and independent subject of property. No equity attaches upon the proceeds of it in favor of third persons, unless there is some contract or agreement, or trust, to that effect.—Ellis on Ins., 81. The assignment of a ship passes no interest in an outstanding policy.

"The fire insurance policy on a house is a merely personal contract and it passes even in equity to the executor, not the heir.—Mildmay *vs.* Holyham, 3 Ves., 472.

"A mortgagee has no claim upon its proceeds.—Vernon *vs.* Smith, 5 B. & A. 1. And as the marine policy is a mere personal contract between the insurer and assured, so the rights of action which flow from it in case of loss, are strictly personal also. *It is not, it never was an interest in the thing insured.* In a case of total loss the rights of the assured to recover by force of it, spring up and have their being only from the moment when his interest in the thing expired."

And on page 171 : "I can not hold, therefore, the amount, whatever it might be, that has been paid, or that may be payable by the insurers, as a part of the defendant's interest in the ship and her freight. The result is, that there can be no recovery against the owners as such."

The date of this decision is not given in the report, but the case shows that the shipment was June 30th, 1851, the steamer was lost July 5th, 1851, and the decision was published in January, 1854. This question was, therefore, decided adversely to the appellants in the first case that arose under the Act of March 3d, 1851.

The masterly grasp of the statute by the learned Judge, has left little to be added by others, and in its main features has been sustained by the decisions of this Court, and was referred to, with approval, in Wright's case, 13 Wall., 127.

The question next arose in June, 1872, when the petition of the owners of the "City of Norwich," was filed in the District Court for the Eastern District of New York, in pursuance of the decision of this Court, in Wright's case, and of the Admiralty Rules then established.

Upon the proceedings for an appraisement of the value of the steamer and of her freight, the appellants offered evidence to prove the amount which the petitioners had collected from insurers by force of contracts of fire insurance, as stated in the record. The Commissioner rejected such amount in his valuation, as not being included in the amount of the owners' liability, as determined by this Court in the Wright case.

Upon exceptions to the report, the question was fully argued, and the Court held: "That neither the expense of raising her, nor of the repairs subsequently put upon her, nor the insurance money received by her owners, under policies of insurance against fire, was to be added to such value so ascertained."

After stating that he did not consider the question settled by the order of reference, nor by the decision of this Court, because the question under consideration did not present itself to be decided, the learned Judge said, 8 Ben., page 317: "*Indeed, the language of the statute seems to render it impossible to raise such a question.* Plainly, the words of the Act do not cover the insurance money, and the absence of any allusion to insurance is significant. *It is difficult to believe that such money would not have been distinctly mentioned, if there had been any intention to include it.*"

And on page 318: "In the second place the amount received for the insurance did not arise from or out of the vessel, but out of certain contracts of indemnity made by the owners of the vessel, to which contracts the freighters were not parties. These contracts were not, and without the consent of the assurers, could not be transferred to the freighters, nor does the Statute make any provision for such a transfer." * * * In respect to the question under consideration, I see no difference in principle, between a proceeding under our Statute and one under the general Maritime Law.. Certainly, the words of the Statute make no difference in favor of the freighters. The exercising the right of abandonment, under the Maritime Law, has often brought up for consideration the question, whether the owner must surrender insurance money, in order to limit his liability by abandonment; and it appears to be settled law that, in such case, a surrender of the insurance is not required;" and the learned Judge then proceeds to cite authorities.

Upon appeal to the Circuit Court the whole question was again elaborately argued before Mr. Justice Strong, holding the Court for the purpose of hearing this case.

In his opinion he says, 17 Blatch., 233, "I come then to the more important question, whether the proceeds of the fire insurance should have been added, to the appraised value of the steamboat. At the time of the collision her owners had policies insuring her against fire, upon which they recovered the sum of $49,283.07; and it is strenuously insisted, that the sum thus received should be added to the value of the boat, and brought into the apportionment. This presents again the question—what is the limit of the liability of ship-owners, defined by the Maritime Law, and adopted by the Act of Congress? As I have said, the sum to be paid into Court for apportionment is the equivalent of what would pass to a trustee by a transfer under the Statute.

"In substance then, the question is this, according to the rule of the Maritime Law, or the Act of Congress (which is the same) does the limit of the owners' liability extend beyond the vessel and her freight, to the insurance which may be upon her at the time of the disaster? The language of the Statute is, 'it shall be deemed a sufficient compliance with the requirements of this Act, on the part of such owner or owners if he or they shall transfer his or their interest in such vessel and freight for the benefit of such claimants, to a trustee to be appointed by any Court of competent jurisdiction, to act as such trustee for the person or persons who may prove to be legally entitled thereto, from and after which transfer, all claims and proceedings against the owner or owners shall cease.' The subject to be surrendered is the interest of the owners in the vessel and freight. Not a word is said of transfer of insurance. A transfer of property insured is not *ex proprio vigore*, a trans-

fer of policies of insurance thereon. Generally, indeed, it avoids the policies. It seems to have been held in Lynch vs. Dalzell, 4 Bro., P. R., 432, that insurances against fire do not attach on the realty, or in any manner go with the same, as incident thereto,by any conveyance or assignment, but they are only special agreements with the persons insuring against such loss or damages as they shall sustain. *There is nothing in the Act of Congress to indicate that the transfer of the interest of the owners to a trustee was intended to have any different effect from that of an ordinary transfer of personal property, which neither in law nor in equity carries with it insurance, or any collateral contract.* It seems to me therefore, that were I to hold that the owners' are responsible, not only to the extent of the value of the vessel and her freight, but also for the insurance collected, I should in effect *interpolate* in the Statute words which Congress refrained from using, and extend the liability beyond the limits prescribed.

"I do not feel the force of the suggestion that because the Statute declares that the liability of the owner 'shall in no case exceed the amount or value of the interest of such owner in such vessel' and her freight then pending, instead of declaring that it shall not exceed the value of the vessel and freight, something beyond the value of the vessel and freight, such as insurance, may have been intended; first because a policy of insurance is no interest in the thing assured, and secondly, because the words of the Statute are plainly not to enlarge liability, but have for their purpose, making provision for part owners of offending vessels.

"Instead of holding a part owner liable to the extent of the whole value of the vessel, they limit his liability to the value of his *interest or share*, leaving the other owners liable to the extent of the value of their shares. I can not doubt such is the meaning of the Statute."

After stating that there is nothing in the Act which extends the liability of the owners beyond that existing under the general maritime rule, and that by that rule the liability does not extend to the surrender of insurance, the learned Justice proceeds to review the Continental authorities.

The next case in which the question was decided was "The Phestigo" 2 Flip., C. C., 466.

The libel was *in personam* by the owners of the schooner "St Andrew," against the owners of the schooner "Phestigo" to recover for damages occasioned by a collision between those vessels.

The "Phestigo" was sunk and became a total loss, with her cargo. She was insured and in the suit the insurance money was attached by garnishee process. The decision was that they had no lien or claim upon the insurance.

Brown, J., after citing numerous Continental authorities, says: "These authorities seem to me to establish a sound principle of law, and to be justified by unanswerable reasons. The liability of the owners is limited to the value of the ship and freight. That liability ought not to be extended by a contract of indemnity made by a man with a third party; in other words, the right of the injured party to reimbursement ought not to be dependent upon the contingency of a contract to which he was not a party, and with which he has no concern. He loses nothing which he would not have lost if the contract had not existed. The contract of insurance is personal in its nature, and is a mere special agreement with a party seeking to secure himself against

apprehended loss on account of his interest in a particular subject matter and not at all incidental to, or transferable with the subject matter."

The shipper has no lien upon it for the non-delivery of his cargo.

Clark vs. Bennett, 7 La., Ann., 342.

Nor can even the master or crew have recourse to it in case of the loss of the vessel.

Eymar vs. Lawrence, 8 La., Ann., 42.

The next case in which the question was determined was Thommesen vs. Whitwill, 21 Blatch., C. C., 45.

Blatchford, Justice, page 65, in relation to this question says: "I think it is sufficient to rest the question on the plain language of the Statute. The 'interest' in the vessel which is the measure of the liability under Sect. 4,283, and a transfer of which, if made under Sect. 4,285, operates to discharge the claim for loss or damage does not extend to what is not an interest in the vessel. It was easy for the Statute to have provided for liability for, and transfer of claims for insurance. It fails to do so whether the Maritime Law did so or not."

The latest case reported, to our knowledge, is "The City of Columbus," 22 Fed. Rep., 460.

"The City of Columbus" was wrecked by stranding and sinking January 18th, 1884.

The petition for limitation of liability was filed February 18th, 1884. The claimants filed motions that all insurance money paid on account of the loss of the steamship should be paid into Court, and appropriated in payment of claims of loss, "as part of the interest of the owner in said steamship."

Nelson, J., page 461, said: "Insurance affected by the owners on the steamship and her freight is not an 'interest in such vessel and freight' which they are bound to surrender for the benefit of the claimants, within the meaning of Rev. Stat., Sec. 4,285."

The decisions in the District and Circuit Courts have thus been uniform, and their soundness is now presented to this Court for final determination.

It is respectfully submitted, that the interest in the vessel, which is the measure of liability under Sec. 4,283, and a transfer of which, if made under Sect. 4,285, operates to discharge the claim for loss or damage, does not include a claim for insurance money received by the owners of the vessel.

## I.

The proper construction of the Statute leads to this result.

1. "The amount or value of the interest of such owner in such vessel and her freight then pending" which is made the measure of his liability, means simply the value of his *interest or share.*

See opinion of Strong, J., *supra.*

Ships, except when owned by corporations, are usually owned by several persons in shares, as an eighth or sixteenth.

It is plain that these words in the Statute are not words of enlargement of liability, but of limitation of it, put in to provide for the case of a part owner who might have an interest in the vessel, which should be less than the whole vessel. If the Statute had said that the liability of the owner or owners should not exceed the value of the vessel, it would have been open to argue that *each* owner was liable for the whole amount of such value. To guard against this, the language was used in the Act, "value of the interest of such owner or owners respectively," and it was provided that such owner or owners might transfer "his or their interest in such vessel and freight." This language was necessary. Without it a part owner could never free himself from liability.

It would be contrary to all rules of construction to give to words, so plainly used for this purpose, and so necessary therefor, the opposite use of enlarging the limit of liability for every owner or part owner.

The use of the word "respectively" has great significance in this connection. It is a word of *separation* and *division*. Sec. 4,283, of the Rev. Stat. accomplishes the same result without the use of the word, but as originally passed this word was properly used to separate and divide the owners where there were several, and that the liability was several, each for his own interest or share of the vessel and freight.

The word "interest" extends to the freight as well as the ship. If both were totally lost to their owners "by a surrender to the waves," could it be contended, in the light of the reported expressions of this Court in relation to freight, that insurance on freight was to be surrendered?

2. The construction of Sec. 4,283, is aided by the language of Sec. 4,284, being Sec. 4 of the original Act, which describes the liability as "*the whole value of the vessel, and her freight for the voyage.*"

It is now settled by the decisions of this Court that all claims for damages arising from the disaster stand upon an equality, when the whole value is insufficient to make full compensation and that the measure of the owner's liability is the same whether he surrenders his interest under Sec. 4,285, or takes "appropriate proceedings" under Sec. 4,284.

The "whole value of the vessel and freight for the voyage" is then clearly the limit of the liability, and in case of part owners, each is liable only for the value of his interest, or share in the ship.

This construction gives full effect to the language of each Section, and renders them harmonious.

"The most natural and genuine way of construing a Statute is to construe one part by another part of the same Statute, for this best expresseth the meaning of the makers, and such construction is *ex visceribus actis.*"

Bac. Abr. Statute I., 2.

3. It has been contended that the use of the word "interest" was intended to include something more than the value of the ship and freight, such as insurance, if the ship happened to be insured, and that the Act may be construed as though it read "the value of his interest *to him*," and that if the ship was insured, even though she became a total loss, without fault of her owners, they had an interest in her to be valued by the amount of insurance recovered.

In answer to this claim we reply that we fail to see how it can be held that a policy of insurance on a vessel or a right of action under it, or the premium paid for it, is an interest in the vessel. No case has been cited in which such a doctrine is declared ; and as will be seen by the discussions of this question in the French authorities, a prominent reason, which is advanced for not including the insurance in the surrender, is that the "ship is not represented by the insurance," which is a right existing by itself, and is the representative of the premium, which the ship owner is certainly not bound to surrender: and that, as there is no lien on the insurance for claims which are liens on the ship and freight, the reason for surrendering the ship and freight does not extend to the insurance.

"The words of a Statute if of common use, are to be taken in their natural, plain, obvious and ordinary signification and import."

1 Kent, Com., 462.

"Interest" as applied to a thing, means the right of property which a man has in it.

1 Bouv. Law Dict., 733.

The value of a man's interest in any property is measured by the extent of his right or title in it.

A contract of insurance, by which the owner is entitled to indemnity for any injury to his interest by the peril insured against, would never be thought of as an addition to the value of his interest. Such a construction would be too metaphysical in giving a reasonable and practical construction to a Statute.

Numerous authorities have been cited by Court and counsel in the discussions and opinions in the various cases above cited.

In addition to these cases we refer to the case of McDonald vs. Black's Admr. 20 Ohio, 185.

The plaintiff in error, the defendants intestate, and one Diller were the owners in equal proportions of the steamboat "Columbiana" and Diller was in command of the boat as captain and running her upon the Missouri River. He effected an insurance on the boat for $2,100. The policy stated the insurance to be made on account of D. McD. & B. and that the company did cause "whom it may concern to be insured, lost or not lost," for the period stated.

Black had previously given a mortgage upon one-sixth of the boat to D. & D. McDonald, the plaintiff in error and his brother, to secure the payment of a note.

The boat was lost, and the company paid the loss. The question was whether the McDonalds were entitled to Black's third of the insurance money by reason of their mortgage lien upon the boat.

The Court said: "The mortgage attached as a lien upon the boat: the mortgagor afterwards effected an insurance upon it, and if the policy attached as an incident to the thing mortgaged and insured, it would seem to follow that without any special provision in the policy the mortgagee would be entitled, upon the loss of the principal thing, to follow all the incidents that had attached to it, and subject them for his indemnity. But it is well settled that this is not the nature or character of a contract of insurance. It is a mere personal indemnity against loss to the person with whom it is

made, or those falling within the scope of its provisions. As soon as the interest of such person ceases in the property, the contract is at an end, from the impossibility of any loss happening to him afterwards. It is not assignable without the assent of the insurer, and inasmuch as it does not attach to the property, it does not pass to the purchaser upon a sale of it. This doctrine is clearly sustained in Wilson v. Hill, 3 Met., 68. Shaw, C. J., says: 'An insurance of buildings against loss by fire, although in popular language it may be called an insurance of the estate, is in effect, only a contract of indemnity with an owner, or other person having an interest in the preservation of the buildings, as mortgagee, tenant, or other, to indemnify him against any loss which he may sustain in case they are destroyed or damaged by fire. If, therefore, the insured has wholly parted with his interest before they are burned, the underwriter incurs no obligation to pay any body.'

"Again, in Powles v. Innes, 11 M. & W., 13, Lord Abinger, C. B. says: 'It is a contract of indemnity only, and nobody can recover in respect of the loss who is not really interested. The policy is but a chose in action, and can not pass merely by the assignment of the ship.'

"But the precise question has been settled by the highest authority.

"In the case of the Columbian Ins. Co. v. Lawrence, 10 Pet. 512, Mr. Justice Story says: 'We know of no principle of law or of equity by which a mortgagee has a right to claim the benefit of a policy underwritten for the mortgagor on the mortgaged property, in case of a loss by fire. It is not attached, or an incident to his mortgage. It is strictly a personal contract for the benefit of the mortgagor; to which the mortgagee has no more title than any other creditor.'

"The same principles were affirmed in the case of Carpenter *vs.* The Providence Washington Ins. Co., 16 Pet., 503. In this case it is said: 'Policies of insurance against fire are not deemed in their nature incident to the property insured; but they are mere special agreements with the persons insuring against such loss or damage as they may sustain, and not the loss or damage which any other person having an interest as grantee or mortgagee, or creditor, or otherwise, may sustain by reason of the subsequent destruction thereof by fire.'"

The Court held that McDonald had no right to the insurance money under and by virtue of his mortgage.

In Plympton *vs.* Ins. Co., 43 Vt., 497, a person having acquired title by levy of an execution upon premises insured by the execution debtor, was held not entitled to the proceeds of the policy in case of loss by fire. In that State, as in Connecticut, land is not sold on execution, but appraised by freeholders, and set off by metes and bounds, to satisfy the execution. The execution creditor acquires title *by operation of law*, and by the levy acquires all his debtor's *interest* in the land; but a policy of insurance was held not to be an interest in, or an incident of the land.

So Judge Brown, in Gleason *vs.* First Nat. Bank of Lapeer, 13 Fed. Rep., 721, says: "I had occasion to apply the same principle to a case where the owner of a vessel, injured by collision, sought to recover from the owners of the vessel in fault, which had been sunk

by the collision, the amount of certain policies of insurance underwritten upon her. *The "Phestigo,"* 9 *Cent., Law, J.,* 285; On examining the law in this case I became entirely satisfied that libellant's lien upon the vessel for his damages did not attach to her policies of insurance, for the reason that the policies were written for the benefitof the owners, and not for that of the creditors of the vessel."

4. It is optional with an owner whether he will pay the premium which another party will demand to insure his interest in a ship. He may prefer to stand as his own insurer; another part owner may prefer to pay the premium and be insured. If the ship is sent on a voyage, and is totally lost, in the act which causes loss and damages to others, inside or outside of her, upon the claim of the appellants, while the owner who stood his own insurer would be discharged "by the surrender of his ship to the waves," the part owner who had the foresight or prudence to insure his interest would lose not only his interest in the ship, but also the premium which he had paid as the consideration of the contract, and also the trouble and expense of a protracted litigation, in which if he was unsuccessful he would have to bear the loss, and if successful recover for the benefit of another. Such a rule "would discriminate to the disadvantage of the small capitalist, who must insure with third persons, in favor of the *millionaire,* whose extended means allow him to stand his own underwriter; and who, not receiving the amount of loss from third persons, would not be called on to pay it over to the shipper; or to the disadvantage of the prudent in favor of the reckless."

"What matters it to the shipper, whether the ship was insured by the owner or a third party? What right can he claim in the one case more than in the other?"

Wattson v. Menks, supra 170.

If the rule of liability were to depend upon such contingencies, an arbitrary limit would seem more desirable.

The entire exemption from damage by fire given by Sect. 4,282, also tends to show that insurance was not included in the amount of the owner's liability under Sect. 4,283. A ship may be destroyed by fire with all her cargo, without the design or neglect of her owners, and be insured to her full value, which her owners recover, and yet they are not liable to the owners of the cargo. The steamer "City of New London" was burned in the river Thames in November, 1871, with a large cargo. She was insured against loss by fire, as was the "City of Norwich," yet her owners were not liable to pay over the insurance money to the shippers. The "City of Norwich" was burned with her cargo. The fire was caused by a negligent collision, and it is claimed that her owners should pay over the insurance. It would seem that if the law makers had intended that insurance should be included they would have done so in both cases.

5. It is urged by counsel in one of the suits involving this question, that the Court should enforce the rule, that "he who asks equity must do equity," and urges that it is inequitable that the shipowner should retain his insurance received in consequence of the loss of his ship, and the claimant lose all compensation by the loss of the ship.

This reasoning assumes that the Court is administering equitable relief, and may therefore impose terms upon which they may deem it equitable to grant it.

But the limit of liability is a matter of *positive law*. It springs from a rule of policy in relation to the encouragement of navigation and commerce. The duty of the Court is to determine what that limit is, and give the benefit of it without conditions. Judge Woodruff, in Wright *vs.* The Nor. & N. Y. Transportation Co., 8 Blatch., C. C., page 28, says: "If Congress had declared that the respondents should not be liable for losses sustained by collision, except to the amount of their interest in the vessel in fault, and her freight then pending, *no Court, whether of Admiralty, or Law, or Equity*, could properly make a decree, which in terms would subject them to a larger liability, and thereby practically nullify the Statute." * * * "It were better to say, if there is no Court which can give a decree in favor of the claimant, without violating the Statute, then no judgment or decree can be rendered." P. 29.

6. It is further urged, "that considered as a question of commercial or maritime law, this Court will regard itself as free to adopt that rule, which it shall on the whole consider most wise and just, in view of all the principles and interests affected, and in view of all the bearings of the matter." It is respectfully submitted that what it shall deem most wise and just, will be exactly the rule which the Statute prescribes.

It belongs to another department of the government to declare what the law *shall be;* this tribunal will fully meet its responsibility and discharge its duty, when it ascertains and determines what the law *is*. "To declare what the law is, or has been, is a judicial power; to declare what it shall be, is legislative."

Ogden *vs.* Blackledge, 7 Cr., 277.

7. The proper rule of interpretation of the statute is of importance, and justly so regarded by both sides to the controversy.

On behalf of the appellants attention is called to the rigor of the common law, by which ship-owners were held liable for the torts of the master and crew, under the doctrine of *respondeat superior*, and as common carriers were liable for all losses not occasioned "by the act of God or the public enemies," and that the Statute being in derogation of the common law should be strictly construed against the ship owner, and liberally in favor of the claimant.

On the other hand we claim that the history of the law, and the reason for its enactment, shows that it should be fairly construed for the furtherance of the object in view. The reason was "to encourage persons to become the owners of ships," and to encourage navigation and commerce.

The common law rule in all its severity, unqualified by legislation, became the law of this country.

The case of the "Lexington" was decided in 1848.

The New Jersey S. N. Co. v. The Merchants Bank, 6 How, 344.

And was followed by the Act of 1851.

Between the loss of the "Lexington" by fire in January, 1840, and the passage of the Act, the ship "Henry Clay," a large and costly ship lying at her wharf in New York, having nearly completed her lading, took fire from some cause and was burned with a cargo already laden, amounting to nearly half a million dollars. The owners were held liable. These two disasters, and the alleged hardships of the law led to the passage of the Act.

Previous to this, and as early as 1818 and 1821, the Legislatures of the States of Massachusetts and Maine had enacted similar laws.

Such Acts are regarded as in harmony with, and as carrying out the principles of the laws and ordinances of maritime Europe.

Stinson v. Wyman, Dav., 172, 176.

The whole object of such legislation professedly and necessarily was, by decrease of liability of those upon whom no personal fault could be charged, to promote that commerce which an enlightened policy should seek to foster.

The object of the Act being so clearly exhibited in its history, and it being the liberal offspring of an enlightened policy, liberal construction, were such necessary, should be given it that its object may be attained. That such should be the construction of such a Statute, under time-honored rules, and every rule that can possibly apply is without doubt.

9 Bac. Abr., 251.
Chamberlain v. The W. T. Co., 44 N. Y., 305.

In this case the Court said: "This is not in any sense a penal statute, nor is it in any way derogatory to natural right, and hence I know of no rule of law that requires that it should be strictly construed. It is true that it changes the common law, but there can be no reason for applying the rule of strict construction to the vast body of statute laws which change the common law. The prior law, whether it be statute or common law, is to prevail, unless the subsequent statute, by a fair and proper construction, repeals or modifies it. This statute is rather a remedial statute. It was enacted to remedy the rigor of the common law, which it was deemed unwise, on grounds of public policy, to continue. It should therefore be construed, if not liberally, at least fairly, to carry out the policy which it was enacted to promote."

But we need not look around for authorities as to the principles by which this Act should be viewed and construed. This Court, from the case of the "City of Norwich," 13 Wall, to the case of the Prov., & N. Y. S. S. Co., v. Hill Mfg. Co., 109 U. S. 578, has manifested no hostility to the Act; but on the contrary has construed and applied its provisions in a liberal spirit, and in a manner to promote the great and important benefits which it was intended to confer upon the shipping interests of the country. The rules adopted by this Court supplemented the provisions of the Statute, and for the first time rendered it really available in cases where it was necessary to bring claimants into concourse.

In the case last referred to, page 588, this Court says: "In those provisions of the Statute we have sketched in outline a scheme of laws and regulations for the benefit of the shipping interest, the value and importance of which to our maritime commerce can hard-

ly be estimated. Nevertheless the practical value of the law will depend on the manner in which it is administered. If the Courts having execution of it administer it in a spirit of fairness, with the view of giving to ship-owners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations (as before stated) will be of the last importance; but if it is administered with a tight and grudging hand, construing every clause most unfavorably against the ship owner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment."

8. Reference is made to the debates in Congress when the Act was upon its passage. In relation to such reference for aid in the interpretation of statutes, Taney, C. J., in giving the opinion of this Court, in Aldridge v. Williams, 3 How., 24, says:

"In expounding this law the judgment of the Court can not, in any degree, be influenced by the construction placed upon it by individual members of Congress, in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law, as it passed, is the will of the majority of both Houses; and the only mode in which that will is spoken, is in the Act itself; and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed."

It has been held by this Court, in construction of this Act of 1851, that the debates in Congress could not affect its construction. The proviso at the close of the Act, that it should not apply to vessels employed in "inland navigation," was added for the express purpose of excluding the western lakes from its operation. 23 *Cong. Globe*, 713–718. And yet this Court held in Moore v. The Am. Transp. Co., 24 How. 1, that the Act did apply to vessels navigating those lakes.

So Woodruff, J., in his opinion, holding that the Act only limited the liability of ship-owners as common carriers, and did not apply to limit their liability for damages to other ships by collision, relied largely upon the debates in Congress, upon the passage of the Act; but his decision was reversed by this Court, relying upon the provisions of the Act.

See his opinion, 8 Blatch., C. C., 21.

## II.

By the general Maritime Law, the ship-owners, (if personally free from blame), were not liable for the negligent or wrongful acts of the master and crew, beyond the amount of their interest in the ship. So that if they surrendered the ship they were discharged.

Norwich Co. v. Wright, supra, 116.
The Scotland, supra, p. 28.

The review of the authorities upon this question, made by Judges Kane, Benedict and Brown, and by Mr. Justice Strong, in the cases which have been cited, leaves little room for discussion; and we refer to the citations and reasons given in those opinions.

In the Norwich Co. v. Wright, supra, this Court, after quoting the language of Pardessus, as follows: "Pardessus says: 'The owner is bound civilly for all delinquencies committed by the captain, within the scope of his authority, but he may discharge himself therefrom by abandoning the ship and freight; and if they are lost, it suffices for his discharge, to surrender all claims in respect of the ship and its freight,'" adds, "such as insurance."

These words thus added are a statement not of the views of the Supreme Court on this point, but of Pardessus. The question was not before the Court for decision, and was not decided.

The words which are taken from him appear to be taken from an early edition of his Droit Commercial. In the edition of 1841, the language quoted is not found. In that edition Pardessus says: "The law authorizes the owner to free himself by surrender of ship and freight, not only from civil responsibility for acts and torts of the captain, but also from all contracts relating to the ship and the expedition." And he adds: "As the owner must surrender the freight, we think that, if he has received it in whole or in part, he must bring in the amount. *We have even brought ourselves to the belief* that, if the ship was insured, the creditors to whom the surrender is made would have the right to demand the amount of the insurance, for the same reason which has led us to say that the acquirer of a thing insured has the right to the amount due from the insurer, in case of loss: in fact the surrender is a transfer of property, or giving in payment."

This language indicates plainly that, however clear may have been the views of Pardessus, when the earlier editions of his book were published, at this time there was a doubt in his mind of their correctness, or at least of their universal acceptance; and as will be seen below, such doubt was well justified.

But whatever be the weight of Pardessus on this question, he stands alone; and against him are numerous and far more weighty authorities.

The language of Boulay Paty, on this subject, referred to by Judge Benedict, is worthy to be quoted:

"The product of the insurance is the price of the premium which the ship owner has paid to insure the ship. This premium is not bound as a security for debts and obligations contracted by the captain; the law expressly binds the ship and freight to that. The Code of Commerce gives to shippers a lien only on ship and freight, consequently they have none on the insurance. In general the ship is not represented by the insurance, which, after the loss of the ship, becomes a right existing by itself, which gives a direct personal action in favor of the insured.

"All these principles, besides, agree with equity and the well understood interests of commerce. Without this rule, indeed, insurances on the hull of a ship would become illusory for her owner, since he would have no way, even by stipulating for a guaranty against barratry of the master, which it is customary to do, to protect himself against any other loss than that of the premium, which, however, is both the object of insurance and the motive for the payment of the premium."

Boulay Paty, Vol. 1, p. 297.

Boulay Paty sustains his views by the high authority of Valin. Other authorities are to the same effect.

"The surrender of the ship and freight does not extend to the insurance which the owner has put upon the ship. Consequently the borrower on bottomry, who has made a surrender, is not bound to account to the lender for the product of insurance on the ship."

DeVillenouve et Masseé Dictionaire du Contentiéux Commercial. Word, Armateur, §18.

"The owner can free himself by the surrender of the ship and freight, unless the captain has acted as the agent of the owner in commercial operations for owner's account.

"The owner can surrender his part of her, if he is part owner. But he is only bound as far as the ship and freight, and not as to his other property, because the captain can bind him only in relation to the thing of which he has the control; nor as far as the amount of the insurance which he has obtained, because that is the representative of a premium paid personally by him."

Eloy et Guerrand.
Des Capitaines, Maitres et Patrons, p. 720.

"In the discussion raised by the presentation of the proposed Law of 1841, some Courts, especially that of Aix, demanded that the surrender should include, besides the ship and the freight, the amount of the insurance which the owner had procured. This claim, which had already made its appearance before the tribunals, had been formally condemned. Insurance, as had been said by the Court of Rennes, is the price of the premium paid by the insured, and this price can not be bound to guarantee obligations contracted by the captain, to which the law pledges expressly only the ship and the freight (Rennes, May 12, 1822).

"Nevertheless, the proposition was reproduced with force in the Chamber of Peers. Its adoption, it was said, would save lenders and shippers from the consequences of an agreement between the captain and the owner, who had been, by his insurance, relieved of his interest, to borrow or sell cargo in order to repair a worthless vessel.

"But this proposition was not accepted. The opinion of the majority, as appears from the discussion, was that the relations established between the owner of the ship and the lenders or shippers ought to remain entirely independent of the contracts of insurance which each of them could make; that the obligation to surrender the amount of the insurance would only amount to forbidding the owner from insuring his ship, as he was already forbidden to insure his freight; for to deprive him of the benefit of the insurance would be to forbid his insuring; and that such a system would make the new law barren for ship-owners."

Bedarride, Du Commerce Maritime, Vol. 1, p. 359.

It was doubtless this discussion and this result, that led Pardessus in his edition of 1841 (the same year) to use language which conveys clearly the impression that he was expressing only his own opinion.

In addition to the sections of Caumont's Dictionaire du Droit Maritime, referred to in the opinion of the District Court, we refer also to sections 57 and 58.

The 7th section of the same article states the earlier authorities for the general rule, as follows:

"The ordinance of 1681, and the jurisprudence of the Parliament of Aix, while it had authority, decided that the owner never exposed anything but his ship to the chances of navigation; that is to say, his sea property and not that of the land. So taught also *Loccenius* and *Vinnius; Decree of Parl. of Aix*, 18 May, 1761; *Emerigon*, chap. 4, Section 4, § 5; *Consul. de la Mer.* ch. 194 and 239; *Grotius* Lib. 2, ch. 11 and 13; Stypmann, part 4, ch. 15, No. 120; *Kuricke*, Quest. 21; *Pothier*, *Treat. on Obligations*, No. 451 and *Charter parties; Boulay Paty* 1, 270; *Dageville* 2, 111; *Fremery*, p. 189; *Court of Cassation*, 9 March, 1814; at *Rennes*, 16 Jan., 1821; at *La Haye*, 4 Nov., 1824; at *Marseilles*, 20 Sept., 1831.

## III.

Prior to 1851, the unlimited liability of the common law was in force in the United States, in all its rigor.

When public policy and the interests of navigation and commerce required a change from the rule of unlimited liability to some rule of limited liability, Congress had full power to adopt such rule as in its wisdom seemed wisest for us as a Nation.

On one hand was the well-known and generally accepted rule of the general Maritime Law.

On the other was the rule of the English Statutory Law.

Congress could adopt either or neither, and establish some rule better adapted to our circumstances.

Upon a careful review of the whole matter, this Court said, (13 Wall., 127,): "We do not hesitate to express our decided conviction, that the rule of the Maritime Law on this subject, so far as relates to torts, was intended to be adopted by the Act of 1851."

In "The Scotland," *supra* p. 29, the Court says: "But while the rule adopted by Congress *is the same as the rule of the general Maritime Law*, its efficacy as a rule depends upon the Statute, and not upon any inherent force of the maritime law * * * Therefore, whilst it is now a part of our maritime law, it is, nevertheless, statute law, and must be interpreted as such."

The question then recurs, whether by the Statute the rule of limitation of liability for torts, by the general Maritime Law, which included the ship and pending freight, and which was discharged by their surrender, and if they were totally lost, the liability was dis-

charged, was the measure of liability under our Statute which provides for such limitation of liability and surrender.

The fact that the rule was adopted which prevailed in the Maritime Law, would furnish persuasive evidence that the rule as understood and practiced at the time furnished a "key to unlock the meaning" of our Statute, if there was any ambiguity in it requiring such unlocking. On the other hand, if the language of the Statute plainly included a surrender of insurance as well as ship and freight, the Statute must control, and the rule of the Maritime Law would not be adopted in that respect. And upon the construction of the Act itself, upon the words therein used, taken in "their natural, plain, obvious and ordinary signification and import,"—(1 Kent Com., 462) we respectfully submit that the Statute fails to include insurance, whether the Maritime Law did or not, as held by Mr. Justice Blatchford in Thommesen v. Whitwill, *supra*, and Justice Strong in Place v. Transportation Co., 17 Blatch, C. C., 221, and by the District Judges in the cases cited, and that in view of the Maritime Rule, if it had been intended to include insurance, it would have been mentioned in the statement of the measure of liability, and in the clause for surrender, so that not only ship and freight, but insurance should be surrendered, to "be deemed a sufficient compliance with the provisions of the Act."

J. W. C. LEVERIDGE,
*Proctor.*

JEREMIAH HALSEY,
*Advocate.*

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OCT 19 1885
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CLERK.

# U. S. SUPREME COURT,

*IN ADMIRALTY,*

*OCTOBER TERM, 1885.*

J. D. DYER, ET AL.,

*vs.*

THE NATIONAL STEAM NAVIGATION COMPANY.

THOMASSEN, ET AL.,

*vs.*

MARK WHITWELL.

*Brief submitted by leave of the Court by counsel for William A. Wright and others in their Appeal* VS. *The Norwich and New York Transportation Company, (No. 62).*

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***Brief submitted, by leave of the Court, by counsel for WILLIAM A. WRIGHT, et al., in their appeal vs. THE NORWICH & NEW YORK TRANSPORTATION COMPANY, (No. 62), on the question involved in the above entitled cases, of the limitation of the ship-owner's liability, under the Statute law of the United States, in cases of collision.***

The above entitled cases call for the consideration and interpretation by this Court of the Statute of the United

States relating to the limitation of the ship-owners' liability. *Act of March* 3, 1851, U. S., R. S., §§ 4,283, 4,284, 4,285.

In the judicial construction by this Court of that Statute the parties in whose behalf this brief is filed, have an interest. They were the libelants in *Norwich Co.* vs. *Wright*, 13 Wall, 104—the pioneer case in this Court involving the construction of the Act of March 3, 1851—and now are appellants from a decree of the U. S. Circuit Court for the Eastern District of New York, affecting the judgment recovered by them in that case. *The Petition of the Norwich and New York Trans. Co.*, 17 Blatch., 221. And, therefore, their counsel have asked and obtained leave to file this brief in aid of the proper interpretation and application of that Act.

There are other important questions involved in their appeal, but this discussion will be mainly confined to the question whether and, to what extent, the remedy afforded by the general maritime law to the lien-creditor against the wrong-doing ship has been affected by this statute.

The cases now before the Court are, we understand, cases, either where the offending ship did not survive the disaster occasioned by her fault, or where, having survived the disaster, she was subsequently lost or the interest of the owner had in some way (it is claimed) wholly ceased to exist, at the time when the owner sought to avail himself of the limitation of the statute.

We desire to call to the attention of the Court the case of an offending ship which not only survives the collision

occasioned by its fault, but thereafter, continues to be in the possession, and subject to the dominion of her owner, until she is seized in the Admiralty Court upon the libel of a lien-creditor suffering damage by the collision and, upon such libel, condemned to satisfy its demands.

Does the statute in such case limit the liability of the ship—or give to the owner the right, by any act of his, to limit the liability of the ship—to her value "immediately after the collision" or at any other time after the collision than when either the creditor seeks to enforce or the owner seeks to discharge that liability? And so that, upon the condemnation of such ship, the owner may relieve her of the condemnation and wholly discharge her of all liens adhering to her, by the payment into Court of a sum of money, equivalent to her value as she was left by the collision, or as that value may be at any other time than when such payment of value into Court is made?

The contention of this brief will be that the statute has no such effect or purpose as that just indicated—that, on the contrary, its sole purpose is to *limit* the liability of the ship-owner to his interest in the ship but within that limit to leave his liability and, necessarily, the remedy of the creditor, as it was under the maritime law before the enactment of the statute. So that the ship-owner's interest in his ship, so long as the ship exists and he remains its owner, shall always be available to the ship's creditor to the full extent allowed by the maritime law, until the ship shall

either be discharged of the creditor's liens by judicial sale, without any consent or action of the owner, or by judicial sale with his consent, upon the transfer by him of the ship to a trustee for that purpose, or an equivalent payment of the same value into Court for the benefit of the creditor.

In pursuing this contention we propose to show:

1. That when this statute was enacted, the general maritime law as administered, not only in the United States where no limitation of the ship-owner's liability by Federal law obtained, but in continental Europe and England, also, where the limitation existed, entitled the lien-creditor to the full amount of the owner's interest in the vessel as that interest might be at the time of its appropriation for his benefit.

2. That the statute did not change the maritime law of the United States in this respect.

**I.** The notable case of *The Rebecca*, Ware 188, shows how fundamental in the general maritime law is the rule by which the ship is bound for the wrongful acts of those charged with its navigation.

In *The Maggie Hammond*, 9 Wall, 449, this lien is declared to be "an element of the original contract" of affreightment. And in cases of collision it is "impressed upon the wrong-doing vessel." *The China*, 7 Wall, 68. *The Siren*, *id.*, 155.

And this maritime lien or hypothecation of the vessel, adheres to the ship from the instant it attaches—as a proprietary interest—a *jus in re*—and travels with her wherever

she may go and in whatever condition she may be, so long as her identity as a ship is preserved.

"It admits, however, of no doubt that if the old keel remains and the identity of the ship can be proved, bottomry claims and other liens upon such vessel may be made good, regardless of the change she has undergone. * * * So the Roman law determines that where a ship is bequeathed and is afterwards completely repaired, if the keel yet remains the legatee may claim the ship."

*Jacobsen's Sea Laws*, Book 1, Ch. 1, p. 15.
*Reddie Law Mar. Com.*, p. 89.

"The maritime lien for damage by collision, attaches to the ship and all her appurtenances, to the freight which has actually accrued due, and subsequent accretions in the value of the ship, arising from repairs done after the period when the damage was occasioned, when such repairs were done by the owner, at his own expense."

2 *Kays Law Shipmaster and Seamen* (Lond., 1875) 975.
*Williams and Bruce Adm. Jur.* 65.

And see:

*The Aline*, 1 W. Rob. 111.
*The Europa*, 2 Moore, P. C. C. (N. S.), 1.
*The Charles Amelia*, 2 L. R. Adm. 330.
*The Bold Bucclergh*, 7 Moore P. C. C., 267.

The source and origin of this lien is to be found in that ancient rule of the maritime law which gave a sort of

personality to the ship, and imposed a responsibility for the faults of its navigation upon her as the offender or guilty *thing*, irrespective of the personality of her owner.

The dictum of Dr. Lushington in *The Druid*, 1 W. Rob., 398, that "the liability of the ship, and the responsibility of the owners, are convertible terms," if it has the meaning apparently given to it by the learned Judge, in *Petition, etc.*, 17 Blatch. 237, that the ship is only liable through the owner, and the owner never through the ship, does not correctly express, we venture to say, the principle by which the maritime law determines the liability of the ship. And that Dr. Lushington did not so intend, is, we think, clear by his opinion in the case of *The Aline*, supra.

But however this may be in England, where the administration of the general maritime law has been largely influenced by common law rules and practice, it is very certain that in this country, and particularly, in this court, the doctrine of the general maritime law, as declared in *The Rebecca* (p. 203,) has been uniformly followed, and the master of the ship regarded "not precisely as the agent, or, in the language of the civil law the *præpositus* of the owners but as standing with regard to them in a peculiar relation which was expressed by the term *commendatory*."

And therefore, as Emerigon says (as quoted by Judge Ware, p. 204): "The obligations of the proprietors are rather *real* than personal. * * The master's legal power does not extend beyond the ship of which he is the master, *that is the administrator*."

And later commentators upon the general maritime law are in accord with this. *Bedarride* in his *Commentaire du Code de Commerce* (Paris, 1859) Vol. 1, Art. 216. says:

"The responsibility of the owner rests upon the basis that those who have directly or indirectly dealt with the captain, acting in that character, and within the limits of his power, have really dealt with the ship itself, which becomes the principal bound."

And in *The Malek Adhel*, 2 How., 234, Mr. Justice Story, in giving the opinion of the Court, says:

"It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which, or by which, or by the master or crew thereof a wrong or offence has been done, as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof. And this is done from the necessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party. * * * The ship is also by the general maritime law held responsible for the torts and misconduct of the master and crew thereof, whether arising from negligence or a wilful disregard of duty; as, for example, in cases of collision and other wrongs done upon the high seas, or elsewhere within the admiralty and maritime jurisdiction, upon the general policy of that law, *which looks to the instrument itself, used as the means of mischief*, as the best and surest pledge for the compensation and indemnity to the injured party."

In *The China*, 7 Wall, 68, this Court say:

"The maritime law as to the position and powers of the master, and the responsibility of the vessel, is not derived from the civil law of master and servant, nor from the common law. It had its source in the commercial usages and jurispudence of the middle ages. Originally the primary

liability was upon the vessel and that of the owner was not personal, but merely incidental to his ownership, from which he was discharged either by the loss of his vessel or by abandoning it to the creditors. But while the law limited the creditor to this part of the owner's property, it gave him a lien or privilege against it in preference to other creditors."

In *Freeman* vs. *Buckingham*, 18 How., 189, it was said, with express reference to the case of The Druid:

"We are of opinion that, under our admiralty law, contracts of affreightment, entered into with the master, in good faith, and within the scope of his apparent authority as master, bind the vessel to the merchandize for the performance of such contracts, wholly irrespective of the ownership of the vessel, and whether the master be the agent of the general or special owner."

And, out of this responsibility which the maritime law imposes upon the offending vessel, has grown the peculiar remedy of the Court of admiralty, *in rem*. Its sole purpose is to enforce the lien by which the ship is bound.

"For the redress of these torts, the Courts of admiralty may proceed *in personam*, and when the cause of the injury is the subject of a maritime lien may also proceed *in rem*. The latter proceeding is the remedy afforded for the enforcement of liens of that character. A maritime lien * * confers upon its holder such a right in the thing that he may subject it to condemnation and sale to satisfy his claim or damages; and when the lien arises from torts committed at sea, it travels with the thing, wherever that goes, and into whosoever hands it may pass. The only object of the proceeding *in rem* is to make this right, where it exists, available—to carry it into effect. It subserves no other purpose. The lien and the proceedings *in rem* are,

therefore, correlative—where one exists the other can be taken and not otherwise."

*The Rock Island Bridge*, 6 Wall, 215.

Now it was also out of this ancient distinction between the liability of the vessel and the liability of the person, that grew the mode by which the principle (grafted upon the Roman law by the maritime law) of limiting the personal liability of the ship-owner to his sea-fortune, was carried into effect.

The ship-owner was allowed to discharge himself from his personal liability by abandoning to his creditor the ship and freight.

That is to say, he was allowed to limit his own liability by limiting the creditor to the remedy which the maritime law gave him against the ship.

But he could not by any act limit the liability of the ship, nor impair, in any degree, the remedy which the maritime law gave the creditor, *in rem*.

In *Norwich Company* vs. *Wright*, it is justly said that, "the learned opinion of Judge Ware in the case of the Rebecca, leaves little to be desired on the subject" of the history of the maritime law in this respect.

From this opinion of Judge Ware and the opinion of this Court in *Norwich Company* vs. *Wright*, it is clear that by the general maritime law:

(1.) The ship was primarily liable for the faults of its navigation; the owner's liability being *through the ship.*

(2.) The owner could, therefore, discharge himself from this liability by relinquishing to the creditor his interest in the ship; in other words he could limit the remedy of the creditor to that part of his property which was invested in the ship, as the representative of his sea-fortune. But against this sea-fortune, after the limitation arose, the remedy of the creditor was absolute.

(3.) This limitation of the creditor's remedy could not arise except by some positive act of the owner, advising the creditor that he could pursue his remedy against the ship without any opposition from the owner. And until such act of "abandonment" the liability of the owner and the remedies of the creditor remained unlimited.

And *Bonlay Paty* makes this clear in contrasting the "abandonment" of Art. 216 of the French Commercial Code with the "delaissement" to the insurer, 1 *Dr. Com. Mer., p.* 293:

"Article 216 does not attach the same effect to the abandonment which it (Art. 369) authorizes; it is the simple declaration of the ship-owner that he makes no claim whatever to that property; it is a mere turning over of the property to the shipper. that he may pay himself if he can out of the thing solely, and not out of the person of the owner, whose obligation, according to the expression of Emerigon, is rather real than personal."

That this abandonment or quit-claim of the ship must

leave to the creditor the whole value of the ship quit-claimed, and as she is quit-claimed, seems obvious.

The sea-fortune of the owner, which he exposes to hypothecation and risk, is his ship, however its value may fluctuate from time to time.

And so by the maritime law, as we understand it to be administered under the Commercial Code of France, the ship-owner, upon the occurrence of a disaster to his ship, bringing him under liability, if he has not renounced his legal right of surrender or abandonment expressly, or tacitly, may make the surrender at any time thereafter. *Caumont Dict. Dr. Mar.*, Tit. Abandon.

From this it must follow that the ship when abandoned to the creditors, (after collision), may be in a different condition, and of a very different value to that when she came out of the collision.

Under the maritime law as administered in France, we understand that the ship-owner who should, after a collision resulting in serious damage to his vessel, repair his vessel fully and for a new voyage, would be held to have elected not to abandon, and therefore, could not thereafter set up his privilege of limitation against the creditor.

But however this may be, it is sufficient for our present purpose, that in no continental country, administering the general maritime law, (as we believe), has the owner, in such a case, ever been allowed to discharge himself by any partial abandonment of his vessel to the creditor, or the abandonment of any other interest in her than his

entire interest as owner at the time of such abandonment.

We have thus stated the condition of the maritime law as we understand it to have been administered in continental Europe, and particularly under the Commercial Code of France, when the United States Act of March 3, 1851, was passed.

At this time the statutory law of England had affected, in important respects, the administration of the general maritime law in that country, as is shown in the opinion of this Court in *Norwich Co.* vs. *Wright.*

The ship-owner's liability was there, by a construction of the statute by the common law courts limited (in case of collision) to the value of the offending vessel and freight at a certain arbitrary point of time—the point of time immediately before the collision. And where there were several sufferers the ship-owner was permitted to go *into a Court of Equity* for an apportionment of that value among them. But there was no provision for any abandonment or transfer of the ship for the benefit of the creditor at any time, as in the general maritime law.

But under this law the creditor, by collision lien, could pursue the ship to the full extent of the owner's interest in her at the time of condemnation, although increased in value since the time of collision.

In *The Aline*, supra, Dr. Lushington says, after noticing the statutory restriction "limiting the liability of the owner

of the ship doing the damage to the value of the vessel itself:"

"Under this modification, therefore, the rights of a person in possession of a decree of this court in a cause of damage are co-extensive with the rights of the owner in the vessel, against which the decree has been awarded. As far as these extend, all the rights of the owner of the damaging ship are clearly a part of the fund to satisfy the successful suitor."

Upon this review of the maritime law as it was administered when the Act of Congress of March 1851 was passed, it is plain that, at that time, the sufferer by collision, in this country, had his remedy against the offending vessel to the full extent of the value of the owners interest in that vessel at the time when such value was sought to be appropriated for his benefit, and we come to the remaining question proposed for our discussion:

**II.** Has this remedy been taken from him by the Act of March 3, 1851?

There is, a two-fold purpose in this Statute. One purpose is to limit the ship-owner's liability in every case of loss without his privity to the value of his interest in the vessel and pending freight; the other, to apportion that value among the sufferers by the wrong, in the special case where there are several on the same voyage and the whole value of the vessel and freight is not sufficient to make compensation to each of them.

The principle of limiting the ship-owner's liability to

the value of his interest in the ship comes, as we have seen, from the maritime law of continental Europe. The principle of apportioning such value among the sufferers where the claimants are more than one, from the equity system of England.

But it must be conceded, we think, that the rule for measuring the ship-owner's liability which the Statute intends is a rule of uniform application—that is, a rule which will provide the same measure whether the creditor claimant be one or several, or whether the mode of applying that measure shall be by the specified mode of a "transfer" or any other appropriate proceeding.

For simplicity of illustration in our consideration of the provisions of the Statute we will take the case of a single creditor claimant—the owner, for example, of the vessel injured by collision. Suppose the wrong-doing vessel to be so altered by her owner, after the commission of the injury, that her value is materially changed from what it was as she came out of the collision;—and then let her be libelled in admiralty for the enforcement of his damage lien by the sufferer in the collision, and upon such libel condemned.

We have seen that by the general maritime law, and particularly as administered in the United States when the Statute was enacted, the libellant would be entitled to enforce his lien against the whole of the owner's interest in such vessel, as that interest might be when she should be brought into the admiralty court.

What provision of the Statute deprives the creditor of this remedy, or in any way impairs its efficacy? or deprives him, or in any way impairs the efficacy of the maritime lien "impressed upon the vessel" by the maritime law?

Such an intent, it must be admitted, is not clearly expressed in any provision of the Statute. But why is it not clearly expressed, if a change in the maritime law of the country so radical that it, in effect, does away with the ancient rule that the maritime lien travels with the keel, and can only be extinguished by a sale (or its equivalent) of the vessel was intended by the law-maker?

Nor, we submit, can any such intent be discovered by any just interpretation of the language of the statute.

In construing such a statute, it should be borne in mind that if its principle is not "tyrannical," as it is said to be in *The Ettrick*, 6 L. R. P., Div. 127, it is, certainly, as is said in *The Benares*, 14 Jur., 581, and approved by Judge Sprague in *Allen* vs. *Mackay*, 1 Sprague 224, "an intrenchment, so far as it goes on the general principle of every man being entitled to recover the whole of his loss from the individual who inflicts it, and, therefore, must not be extended beyond the fair import of its language."

Now, in *Norwich Company* vs. *Wright*, it was not without some pains that this Court ascertained the intention of Congress as to the measure of the ship-owner's liability provided by the statute.

But it did discover the key to that intention in "the

provision for the ship-owner to discharge himself, *as in the maritime law*, by giving up the vessel and freight," (p. 126.)

The provision referred to is that in the 4th section of the original act, (R. S., § 4,285,) which provides for a "transfer of the owner's interest in the vessel and freight to a trustee for the benefit of the claimant or claimants, *from and after which transfer all claims and proceedings against the owner or owners shall cease.*"

But if this provision of a transfer is decisive evidence, as the Court found it to be, of the intention of the statute to measure the owner's liability by the value of the vessel at some time after the collision, is it not with greater reason decisive evidence that the statute intends the absolute liability to remain until the owner shall either transfer the vessel "in compliance with the requirements of the act," or do some other equivalent thing?

And does it not necessarily follow that the equivalent thing to do must be something which will give to the claimants the value of the vessel at the time the thing is done?

And, therefore, if the owner may pay value into Court instead of transfer the vessel to a trustee, that such value must be the value of the vessel as she then is when the payment into Court is made?

If this is not so, the statute is open to the construction, which clearly must be rejected, that it provides two differing measures of liability—one furnished by the value of

the vessel when transferred in specie, and the other by her value in money at some other time.

For that the statute intends by the transfer, which it declares to be "a compliance with the requirements of the act," a *present* transfer, and not a transfer *as of* some other time is, we submit, clear from the language used; and so it has been construed by this Court.

Such is plainly, we submit, the meaning of the opinion in *Norwich Company* vs. *Wright*, where it is said:

"If the vessel were libelled, and either sold or appraised, and her value deposited in Court, this sum, together with the amount of freight, (when proper to be added,) would constitute the *res* or fund for distribution."

But this is put beyond question in the opinion of the same learned judge in *The Benefactor*, 103 U. S., 246:

"The counsel for the appellees is mistaken in supposing that the value of the offending vessel at the time of the collision furnishes the only criterion of the amount for which her owners are liable. In *Norwich Co.* vs. *Wright*, we held that the owners of the offending vessel could, under the statute, discharge themselves from personal liability by surrendering the ship and freight. This would imply that the value of the ship at the time of surrender (with the addition of the pending freight), if the surrender is made in a reasonable time, would furnish a proper criterion of the amount of liability."

And so in *The Scotland*, 105 U. S., 24, while it was held that the statute provides two modes for its effectuation, one by a transfer of the ship and freight, and the other by an apportionment of value, and that the owners, in that case, were entitled to avail themselves of the latter mode,

notwithstanding they had not made any transfer, still they were required "to pay the value of the ship's strippings and remnants into Court," to be "distributed *pro rata* amonst the claimants"

And to the same effect is the opinion of Judge Kane in the leading case of *Watson* vs. *Marks*:

"Such a transfer is merely the formalization of a trust existing before, a trust now to be administered by the Court, instead of the ship-owner, an act of law, or under legal sanction, which passes the legal title out of the owner, but leaves the creditors of the vessel in the same plight against her as before."

In *Petition, &c.*, 17 Blatch., 230, it is said:

"It may, perhaps, be conceded that if after the vessel was raised and repaired the owner had sought the protection of the statutory limitation by transferring her to a trustee, the creditors would have been entitled to her, as she then was in her improved condition. This, not because her value then was the value for which they were, at all Courts, responsible, but by force of the transfer."

How by force of the transfer? Surely a transfer which the statute declares to be a compliance with its *requirements* cannot be a transfer which will carry to the creditor something which he was not *entitled* to receive, or anything which he could only receive by the grace of the owner.

If the transfer has any force by the statute whatever, it must be the force given to it by the Court in *The Benefactor*. It must carry to the creditor the value of the vessel at the time when the limit of the owner's liability arises

—which is not until the transfer is made. Then, and not till then, his liability becomes wholly *real*, and ceases to be at all *personal*.

Now if this is so, that the only *expressed* intent of the statute as to the proper criterion wherewith to measure the owner's liability, is to be found in this provision for a transfer, and that the intent thus expressed is that the value of the ship at the time of such transfer furnishes such criterion, does any implication arise from any other provision of the statute which is in conflict with such intent?

The only other provision of the statute concerning (as we conceive) the single creditor, whose case we are now considering, is that of Section 3 of the original Act—the general provision that the liability of the owner, &c., "shall in no case exceed the amount or value of the interest of such owner or owners respectively in such ship or vessel and her freight then pending."

But this declaration is in close harmony with the provision for a transfer. If the provision for a transfer requires the owner to transfer his whole present interest in the vessel for the benefit of the creditor, the inference is necessary and unavoidable that this declaration means that in the case of an existing wrong-doing vessel which can be transferred, the liability of the owner shall not exceed the amount or value of the interest therein which the owner is required to transfer if he elects to transfer anything.

That is to say, the measure of the owner's liability is his interest in that ship or vessel which by the maritime law is responsible in specie for the injury—the vessel which is bound by the tacit hypothecation of the maritime law to pay "with its whole value" the losses resulting from its fault—and the vessel which the owner may transfer to a trustee for the benefit of his creditors if he desires to comply with the requirements of the statute. And so long as that vessel exists and is liable to admiralty seizure at the suit of the creditor or to "transfer" by the owner, so long it continues, with its present value, to measure the liability of its owner.

The declaration of Sec. 3 is, therefore, only the declaration of the maritime law that the ship-owner, in the cases there mentioned, may, if he chooses, restrict his creditor to the remedy (in effect) which the maritime law gives him *in rem*—against the vessel, or, as it is expressed in *The China* supra the "primary liability" is regarded as upon the vessel and the limitation "*limits the creditor to this part of the owner's property.*"

For the statute, it will be observed, makes no attempt to interfere with the ordinary jurisdiction of the admiralty court *in rem.* Indeed this provision for a transfer "to a trustee" seems to have been intended for the purpose of affording the State or common law courts (and the Act of 1851 had its origin in States having similar legislation) a method of applying the statute analogous to that which is peculiar to the Admiralty Court.

We have considered the sections of the statute particularly relating to the case of a single creditor, whose lien claim may exceed the value of the vessel he is proceeding against. But the section of the statute providing, with distinctness, for an apportionment, in the case of several claimants, of "the sum for which the owner may be liable among the parties entitled thereto," is also in entire harmony with the position we have sought to maintain.

What is the sum here referred to? Obviously the sum which is "not sufficient to make conpensation to each" of these parties—and that sum is the "whole value of the vessel and freight for the voyage"—and that vessel is the vessel which, by the maritime law, is bound, and as she is bound, to make that compensation. And this is the value which, as we have seen, the creditor is entitled to receive by the statutory transfer.

The force of this section is in its first paragraph declaring, in effect, that the whole value of the vessel shall be distributed equitably among *all* the lien creditors instead of being left to the "prior petens" of the maritime law. The paragraph following only permits what the parties interested could do without it—that is, avail themselves of any appropriate jurisdiction for the enforcement of the rights there declared.

This section seems to contemplate a vessel existing at the time of the apportionment and, in the original act, the provision for the transfer, in specie, was a part of this

section as if specially germane to the provision for the apportionment.

In *The Scotland* this Court has held, that this section authorizes the payment of value into Court, as the basis of the apportionment, as well as the transfer of the vessel in specie. But this value, must clearly be the same value as that contemplated in the case of the single creditor—the value of the vessel through which the owner is liable and which he has the right to transfer. Otherwise, we have the case rejected by the learned Judge in *Petition, &c.*, 17 Blatch., 231.

"The owners have their option of these two modes. They may give up the vessel and freight or they may retain them and pay their value. But the measure or limit of liability in each case is the same. Very plainly it is not intended that the creditors shall obtain more when one mode of proceeding is adopted than when the other is followed."

Very plainly not. And let us add that it is equally plain that it cannot be intended that the creditors shall receive any less by one mode than by the other. And therefore the value to be paid must be the value of the vessel for the transfer of which the payment is a substitute.

And this, we submit, is the clear indication of the Admirality Rules (54–57), passed upon the decision of *Norwich Co.* vs. *Wright*, where it is provided that when any ship is libelled, &c., and the owner shall desire to claim the benefit of the statute, he may file his libel or petition in the Court where the vessel is:

"And thereupon, said Court, having caused a due appraisement to be had of the amount or value *of the interest of said owner or owners, respectively, in such ship or vessel* and her freight for the voyage shall make an order for the payment of the same into Court, wherever the same shall be ordered; or if the owner or owners shall so elect, the said Court shall, without such appraisement make an order for the transfer by him or them of *his or their interest in such vessel* and freight to a trustee to be appointed by the Court under the fourth section of the act."

Manifestly the interest which is here directed to be appraised is the same interest that may be transferred. And if the transfer is required to be of the owner's present interest, the appraisement must necessarily be of the same interest.

In *Norwich Co.* vs. *Wright* this court held, by reason of the provision for a transfer of the vessel in specie, that the time for measuring the ship owner's liability by the value of his interest in the vessel, was at some time *after* the collision, "as in the maritime law," and not at some time *before* the collision as in the law of England. But *the* time after the collision was not designated any further than by the inference from these rules, and the special directions in the case before it which clearly contemplate (p. 124) that the vessel (or her equivalent value) as she then was under seizure constituted the *res* or fund for distribution.

And the argument adverse to the contention of this brief, that the 3d section of the original Statute (R. S. § 4283) limits the liability of the owner to the value of his